

THE FREEDOM TO ORGANISE AND ITS PROTECTION BY LAW IN
GREAT BRITAIN, THE UNITED STATES OF AMERICA, AND
THE FEDERAL REPUBLIC OF GERMANY

By

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PREFACE

Much has been written by eminent jurists about the purpose and importance of Comparative Labour Law. For me the study of the law of several countries has proved a considerable aid in the understanding of each of them.

The law of each of the three countries has been set out separately under broad headings because I came to the conclusion that smaller subdivisions might lead to confusion. They would unduly emphasise the technical differences, rather than point out the varying approaches, shortcomings and advantages.

I do not go into detail as to why the law in the three countries is as it is. This I leave to historians, political scientists, economists and sociologists.

I discuss whether the law in each country protects the freedom of the individual to refrain from organising, and, if so, how. Union security clauses and trade union members' rights in my view deserve a special study.

As freedom to organise is not of much use without freedom to strike the law relating to the latter has also been dealt with. In the American part I discuss the law relating to strikes, picketing and boycott in more detail, it appeared to me actually to form part and parcel of freedom to organise.

I encountered special difficulty when dealing with the German part of the thesis. It is not that the law is very complicated, but I found only a few books where its provisions had been translated into English, and most of this translation had been done at the beginning of the

century, and then not in full. In addition, only a few interpretations of the law have been translated into English, and then generally only an outline is given. I have translated from the German and tried to find equivalent English legal terminology, but this was sometimes impossible because of the different legal systems.

After the part of the thesis dealing with the law in Great Britain was completed, the Trade Disputes Bill, 1965, was passed by Parliament. The Act has the exact wording of the Bill which is mentioned in the thesis. Since I have considered the legal implications and significance of the Bill (as it then was) I have not judged it necessary to alter this part of the thesis.

One interesting decision recently given by the NLRB has come too late to be incorporated in the main body of the thesis. In *J. P. Stevens and Co. Inc. & Industrial Union Department AFL-CIO* (157 NLRB No.90, 1966) the Board decided that the conventional remedies to which I refer on p.42 are insufficient in cases where "massive and deliberate" unfair labour practices are committed.

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GERMAN ABBREVIATIONS

AÖR	.. Archiv fuer oeffentliches Recht.
AP	.. Arbeitsrechtliche Praxis
AR-Blattei	.. Arbeitsrecht-Blattei
ARS	.. Arbeitsrechtssammlung
ArbuR	.. Arbeit und Recht
BAG	.. Bundesarbeitsgericht
BB	.. Der Betriebs-Berater
BVerfG	.. Bundesverfassungsgericht
BVerfGE	.. Entscheidungen des Bundesverfassungsgerichts
BetrVG	.. Betriebsverfassungsgesetz
LAG	.. Landesarbeitsgericht
RdA	.. Recht der Arbeit
RAG	.. Reichsarbeitsgericht
RG	.. Reichsgericht
RGZ	.. Entscheidungen des Reichsgerichts in Zivilsachen
ZPO	.. Zivilprozessordnung

PART I

THE RIGHT TO ORGANISE AND TO STRIKE

Chapter 1

Freedom to Organise in Great Britain

In Great Britain freedom to organise was established as far back as 1824.¹ Employees are free to form and to join trade unions; they do not commit an unlawful act by doing so.

Since Parliament is all-powerful it may do anything by a simple Act and it may certainly, if it wishes to do so, impose restrictions upon the right to organise. It is, however, very unlikely that Parliament would take drastic steps in this respect without the backing of the majority of the electorate.

The only employees upon whom restrictions are imposed by statute are members of the police force. The Police Act, 1919,² passed as a result of the police strike of the same year, prohibits members of the police force from belonging to trade unions of any kind.³

1. For further details see Combination Laws Repeal Acts of 1824 and 1825, (5 Geo.4, c.95, & 6 Geo.4, c.129 respectively).

2. 9 & 10 Geo.5, c.46.

3. It is provided in s.2(1) of the Police Act, 1919 :
" it shall not be lawful for a member of the police force to become a member of any trade union, or of any association having for its objects, or one of its objects, to control or influence the pay, pensions, or conditions of service of any police force; and any member of a police force who contravenes this provision shall be disqualified for continuing to be a member of the force; and, if any member of a police force continues to act as such after becoming so disqualified, he shall forfeit all pension rights and be disqualified for being thereafter employed in any police force.

The Act established a Police Federation for members of the police force.⁴ This Federation must be entirely independent of and unassociated with any bodies or persons outside the police service.⁵ Civil servants and other public employees are not restricted in any way in their right to organise.⁶

4. Ibid s.1.

5. Owing to the absence of "statutory objects" the Federation is not a trade union recognised by law. For statutory objects see Trade Union Act, 1913, ss 1 and 2. See Citrine, Trade Union Law, second ed., (1960), pp.300, 301. The Police Act, 1919, also establishes a Police Federation for members of the police force in Scotland and authorises the Secretary for Scotland to adapt the provisions of the Schedule to the Act to the circumstances of Scotland.

6. Under the Trade Disputes and Trade Unions Act, 1927 it was made illegal for local or other public authorities to make it a condition that any person employed by the authority, should or should not be a member of a trade union. This was not, however, strictly speaking a restriction on the right to organise; it was not aimed at trade union membership as such but merely proscribed closed shop arrangements. As a matter of fact it is the only piece of legislation which was ever in force in Britain that protected freedom of organisation. By the same Act members of the civil service were prohibited from becoming members of any unions with political objects and their unions were denied the right of affiliation with any other industrial or political organisation. The Act was wholly repealed by the Trade Disputes and Trade Union Act, 1946.

Protection of Freedom to Organise

The law does not protect and safeguard the right of employees to form and join trade unions. The right to organise is not protected by law against infringement by employers. In other words steps taken by an employer to discourage union membership are not illegal. It goes without saying that when by his activities an employer commits a tort or a breach of contract an action can be brought against him. But these are rights which every person enjoys and have nothing to do with an employee's right to organise.

The "yellow dog" document, a contract by which an employee agrees, as a condition of employment, that he will not join any union or continue to be a member of a union during his tenure of employment, is not illegal.⁷ An employer is permitted to discharge an employee because of union membership or activities as long as he keeps to the terms of the contract regarding dismissal or complies with the statutory requirements under the Contracts of Employment Act, 1963, whichever is applicable in the specific case.⁸ There is no law proscribing the so-called company union - a term used in a derisive sense to indicate an employer-dominated union.⁹

An employer engaged on Government contracts has

7. For "yellow dog" document see post, pp.201 f.

8. See post, pp.198 f.

9. For company unions see post, pp.208 ff.

to recognise the freedom of his employees to be members of trade unions, and has to be responsible for the observance of this by any sub-contractors who may be employed in the execution of the contract.¹⁰

In 1950 the United Kingdom ratified I.L.O. Convention No. 98 but so far this has not been translated into law.¹¹

The right of the individual to refrain from organizing is not protected by law. Any type of union-security agreement is allowed.¹²

10. Fair Wages Resolution of the House of Commons of 14th October, 1946, No.4, 427 Hansard 619 f. See Cmd 7225 p.289. For the effect of this Resolution see post, pp.189 ff.

11. Convention No. 98 concerning the application of the principles of the right to organise and to bargain collectively. See post, pp.206, 208.

12. It was laid down in Reynolds v. Shipping Federation [1924] 1 Ch.28 that a closed shop agreement as such is not an actionable conspiracy. In Crofter Hand Woven Harris Tweed Co. v. Veitch [1942] A.C.435 Lord Wright said that 100 per cent membership was one of those "legitimate purposes" which justified an agreement though it might inflict injury on others. For civil conspiracy see post, pp.17 ff. See also Faramus v. Film Artistes' Assoc. [1964] 1 All.E.R. 25 H.L. For "the right to refrain from organizing" in the United States and in the Federal Republic of Germany see post, pp.147 ff. and pp.171 ff. respectively.

Chapter 2

Freedom to Strike and to Engage in other Types of Economic Warfare in Great Britain

I The Right to Strike

1. General Observations

In countries like Great Britain, where the law does not protect the right of employees to form and to join unions, it is even more essential than in other countries where the law does so, that employees should have the right to engage in economic warfare for mutual aid and protection.

The right to strike is not expressly laid down in a statute but by virtue of the Conspiracy and Protection of Property Act, 1875,¹ the Trade Disputes Act, 1906,² the Trade Disputes Bill, 1965,³ (which will very soon become law) and the Crofter case,⁴ one can safely say that employees in Great Britain enjoy a right to strike. By these Acts an immunity from liability for certain tortious acts and certain criminal acts is conferred on persons acting in contemplation or furtherance of a trade dispute.⁵

At the outset it has to be pointed out that whether a strike is official or unofficial, i.e. has union support or not, does not make any difference as far as criminal or civil liability is concerned.

1. 38 & 39 Vict. c.86. See post, pp.6 f.

2. 6 Edw. 7, c.47. See post, pp.19 ff.

3. The Bill will in a way reinstate the law as it had been understood to exist before Rookes v. Barnard [1964] 2 W.L.R.269. See post, p.21 footnote 11.

4. Crofter Hand Woven Harris Tweed Co. v. Veitch [1942] A.C.135, generally referred to as the Crofter case. See especially per Lord Wright on p.463.

5. For the meaning of "trade dispute" see post, pp.15 f.

2. Criminal Liability

After 1825 the courts developed the law of criminal conspiracy which made collective withdrawal of labour punishable.

Criminal conspiracy has been defined as "an agreement of two or more persons to do any unlawful act or to do a lawful act by unlawful means". It embraces agreements to commit all unlawful acts, and the word unlawful here has a very wide meaning, besides criminal acts it includes not only merely tortious acts but also all kinds of acts (not in themselves contrary to law) which the courts find injurious to the public. It is not necessary that the agreement should ever be put into effect. Willes J. said in Mulcahy v. R¹: "The very plot is an act itself and is punishable".

The Conspiracy and Protection of Property Act, 1875, removes the threat of prosecution for conspiracy based on mere combination in the case of strikes in furtherance of a trade dispute. The Act provides that an agreement or combination by two or more persons to do or to procure to be done any act in contemplation or furtherance of a trade dispute will not be indictable as a conspiracy if such an act, committed by one person would not be punishable as a crime.² It should be noted where the defendant cannot

1. (1868) L.R. 3 H.L. 317.

2. See s.3 of the Act. The rule, however, does not apply to any kind of conspiracy for which a punishment has been laid down by statute nor to offences coming under the law of riot, unlawful assembly, breach of the peace, or sedition, or offences against the State or Sovereign.

show that his act was done in contemplation or furtherance of a trade dispute³ the statutory protection does not apply.

The Act of 1875 repealed a number of earlier statutes under which breaches of contract of employment were criminal offences.⁴ However, the Act makes such breaches criminal in two cases. It is provided in s.4 that a person employed in a gas or water supply concern who wilfully and maliciously breaks his contract knowing that his action, either alone or in combination with others, will deprive the consumers of their supply, is liable to prosecution. The provision was extended to electricity concerns under the Electricity (Supply) Act, 1919. The Act of 1875 contains the further provision that a person wilfully and maliciously breaking a contract of service knowing that the probable consequences of so doing, either alone or in combination with others, will be to endanger human life or cause serious bodily injury, or expose valuable property to destruction or serious injury, is liable to be prosecuted.⁵

The Emergency Powers Act, 1920 enables the Crown to proclaim a "state of emergency" if it appears that

3. For the meaning of "trade dispute" see post, pp.15 f.

4. Among the measures repealed was the Master and Servant Act, 1867.

5. s.5.

essential public services are threatened by action or intended action.⁶ Regulations may then be made by Order in Council for securing the continuance of those services and the safety of the public.⁷ It should be noted that the right to strike and peacefully to persuade others to do so is expressly preserved.

The law does not forbid civil servants (servants of the Crown) and other public employees to strike.⁸ Certain post office employees are somewhat restricted in their right to strike. S.58 and s.59 of the Post Office Act, 1953, create offences in respect of endangering or delaying the mail. Thus a "go slow" or a strike may easily involve certain postal employees in criminal liability. S.3 of the Police Act, 1919, makes criminal any act likely to cause disaffection, breach of discipline, or a withdrawal of services by members of the police force.⁹

6. 10 & 11 Geo.5, c.55. The Proclamation of Emergency, if it is not renewed, expires after a month. See s.1(1) of the Act.

7. S.2(2) of the Emergency Powers Act, (1920) provides : "Any regulations so made shall be laid before Parliament as soon as may be after they are made, and shall not continue in force after the expiration of seven days from the time when they are so laid unless a resolution is passed by both Houses providing for the continuance thereof". Regulations were made during the Coal Strike of 1921, the General Strike of 1926, the Docks Strike of 1949 and the Railway Strike of 1955. During the Docks Strike of 1948 a proclamation was issued but no regulations were made. See Citrine, Trade Union Law (1960), pp.20f, p.513.

8. However, striking is a disciplinary offence on the part of a civil servant. See H.M. Treasury, Staff Relations in the Civil Service, 1949, p.21. See also K. W. Wedderburn, The Law and Industrial Conflict in Great Britain, in Labour Relations and the Law (1965), p.146, note 93.

9. By s.25 of the Police (Scotland) Act, 1956 similar provisions apply to Scotland.

The Aliens Restriction (Amendment) Act, 1919, provides :
"if an alien promotes or attempts to promote industrial unrest in any industry in which he has not been bona fide engaged for at least two years immediately preceding in the United Kingdom, he shall be liable on summary conviction to imprisonment for a term not exceeding three months."¹⁰

As Professor Kahn-Freund has pointed out, since 1875 the criminal law has ceased to play any decisive role in British industrial relations.¹¹

10. 9 & 10 Geo.5, c.92. See s.3(2) of the Act. The expression "alien" comprises all persons who are neither British subjects nor British protected persons nor citizens of Eire. For further details see the British Nationality Act, 1948, (11 & 12 Geo.6, c.56) and the Ireland Act, 1949 (12 & 13 & 14 Geo.6, c.41).

11. See The System of Industrial Relations in Great Britain (1956), Chapter II, p.104.

3. Civil Liability

(a) The Immunity of Trade Unions

A general immunity from liability for tortious acts is conferred on trade unions, but this does not extend to members individually. It is provided in s.4 of the Trade Disputes Act, 1906, that an action against a trade union, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any Court.¹

Until recently it was generally believed that actions for injunctions to restrain future torts are prohibited under s.4. In Boulting v. Association of Cinematograph Television and Allied Technicians² two Lord Justices considered that an injunction to prevent an apprehended injury could be granted against a union³ but in Rookes v. Barnard⁴ the Law Lords refer to the complete immunity of the union itself under s.4. However, determination of this point was not necessary to the decision in Rookes case.

1. This part of the section is not limited to tortious acts committed in contemplation or furtherance of a trade dispute. For further details see Citrine, Trade Union Law, second ed. (1960) pp. 479 ff.

2. [1963] 2 Q.B.606, at pp. 643, 649, per Upjohn and Diplock L.JJ.

3. Cf. Ware and De Freville v. Motor Trade Association [1921] 3 K.B.40 at p.75, per Lord Scrutton L. J. and Camden Exhibition and Display Ltd. v. Lynett [1965] 3 W.L.R. 763 C.A.

4. See [1964] 2 W.L.R. pp.283, 302 and 308.

(b) Inducing Breach of Contract

At common law an action in tort will lie against a person, who without justification, unlawfully and knowingly procures another to commit an actionable wrong against a third person, whereby the latter suffers damage.¹ Thus to induce a person to break a contract is in general a wrong for which the party whose contractual anticipations are disappointed may claim damages. The rule is applicable to contracts of all kinds and includes contracts of employment. In calling out employees to strike, trade union officials often induce inevitable breaches by the men of their contracts. The operation of the rule is to a certain extent excluded by s.3 of the Trade Disputes Act, 1906.²

In Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch³ Lord Simon said : "If C has an existing contract with A and B is aware of it and if B persuades or induces C to break the contract with resulting damage to A, this is, generally speaking, a tortious act for which B will be liable to A, for the injury he has done him."⁴ In some cases, however, B may be able to justify his procuring of the breach of contract."

1. Citrine, Trade Union Law, (second ed.) 1960, p.466.

2. See post, p.14.

3. [1942] A.C. 435 at p.442. A leading case in which a detailed analysis was made of the law of conspiracy, see post, pp.17 f.

4. A, may on principles of contract claim redress from C, on principles of tort redress from B. See Lumley v. Gye (1853), 2 E & B 216.

To be liable the defendant must have had knowledge of the particular contract involved but where he has deliberately shut his eyes the court may decide that he has constructive knowledge of that contract.⁵ In Stratford v. Lindley⁶ the House of Lords made it clear that there was no need for it to be proved that defendants knew with exactitude all the terms of the contract.

The inducement must be more than mere advice, but if the advice is of such a nature that it is for all practical purposes equivalent to persuasion it will suffice. The fact that the party inducing the breach is not actuated by malice is immaterial.⁷

The interference must either be direct, or if indirect, - i.e. inducing A to do some act which will interfere with the performance of a contract between B and C - the act which A is induced to do must in itself be unlawful or wrongful.⁸ The breach must be a necessary consequence if the procurement is indirect, but where the procurement is direct the breach need be shown to be no more than "a reasonable consequence" of the defendant's act.⁹

5. See D.C. Thomson & Co. Ltd. v. Deakin [1952] Ch. 646 at p.687.

6. See [1964] 3 W.L.R. 541 at p.554, per Lord Pearce.

7. See Allen v. Flood & Taylor [1898] A.C. 1 at p.154, per Lord Macnaghten.

8. See D.C. Thomson v. Deakin, supra, at pp.681 - 682.

9. Stratford v. Lindley [1964], 3 W.L.R. 541 at p.555, per Lord Pearce.

The conduct of the third party must have the result that a breach of contract ensues or is continued. This includes any breach of the contract of employment not only leaving work without giving proper notice.¹⁰

In an action for inducing breach of contract the plaintiff must prove that he has suffered damage. If the breach, which has been procured by the defendant, has been such as must in the ordinary course of business inflict damage upon the plaintiff it is unnecessary for him to prove special damage.¹¹ A declaration or injunction may be obtained to prevent damage in the future.¹²

Just as an employer may sue a third party who induces his employee to break his contract of employment, so an employee may sue a third party who procures the employer to break such contract.¹³

Defences

(1) Lawful justification is a defence. It is difficult to define with precision what constitutes lawful justification for inducing a breach of contract. It was

10. Even a breach of an implied condition, e.g. "slow down" constitutes a breach of contract. Furthermore it may be that obligations of a collective agreement are incorporated into each contract of employment e.g. a no strike clause. For the latter see Rookes v. Barnard [1964], 2 W.L.R. 269.

11. See Goldsoll v. Goldman [1914] 2 Ch.603 at p.615.

12. See Bents Brewery Co. v. Hogan [1945] 2 All.E.R. 570 at p.579, and Stratford v. Lindley [1964] 3 W.L.R. pp.559, 560.

13. For example, if a third party induces an employer to declare a lockout without giving proper notice to the employees concerned.

held in Glamorgan Coal Co. v. South Wales Miners' Federation¹⁴ that in determining whether or not there was justification, regard must be paid to the nature of the contract broken, the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach, the relation of the person procuring the breach to the person who breaks the contract, and the object of the person in procuring the breach.

(ii) In industrial disputes the defence more often arises by statute. It is provided by the Trade Disputes Act, 1906, s.3 that : "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment" If there is some ground of action other than the mere fact of interfering with contractual relations s.3 does not afford protection. If intimidation or other illegal means are used to induce the breach the section gives no protection, for there is some other ground of action. In Rookes v. Barnard the House of Lords held that the tort of intimidation comprehends not only threats of criminal or tortious acts but threats of breaches of contract.¹⁵ Thus in Rookes' case the House of Lords considerably restricted the right to strike. There is now a Bill¹⁶ before Parliament in which it is

14. [1903] 2 K.B.545 at p.574, per Romer L. J. See also Brimelow v. Casson [1924] 1 Ch. 302 and Camden Nominees v. Forcey [1940] Ch. 352.

15. [1964] 2 W.L.R. at pp.279, 296, 307, 312, 336.

16. Trade Disputes Bill, 1965, see post, p.21 footnote 11.

provided that where there is a trade dispute a threat to break a contract does not amount to intimidation.

S.3 affords protection only where there is a trade dispute. The Trade Disputes Act, 1906, s.5(3) provides : "In this Act and in the Conspiracy and Protection of Property Act, 1875, the expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, of the terms of the employment, or with the conditions of labour, of any persons, and the expression "workmen" means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises"

A workman must be a party to the dispute, either individually or through his union. It should be noted that the subsection does not cover a dispute between an employer and an employers' association.¹⁷ The workman must be employed in trade or industry. The dispute must be in connection with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person. Disputes as to whether a person shall become a trade unionist or join a particular union may be trade disputes.¹⁸ Recognition disputes

17. See Larkin v. Long [1915] A.C. 814.

18. See White v. Riley [1921] 1 Ch. 1.

between an employer and a trade union will normally be trade disputes.¹⁹ Moreover sympathetic strikes and secondary action are trade disputes within the meaning of s.5(3) of the Trade Disputes Act, 1906.

To constitute a dispute, a mere personal quarrel will not suffice. In Huntley v. Thornton²⁰ Harman J. holding that there was no trade dispute said : "The defendants were not asserting a trade right, for they knew they could not procure the plaintiff's expulsion from the union. The dispute, if it could be so called, has become an internecine struggle between members of the union and no interests of 'the trade' were involved. It was a personal matter."

It is important to note that the statutory rules set out a right to engage in concerted activities for all employees, not only for those who are members of a union.

19. See Beetham v. Trinidad Cement Ltd. [1960] 2 W.L.R.77. However, in Stratford v. Lindley it was held that an inter-union dispute about recognition is not a trade dispute, see [1964] 3 W.L.R. at p.546, per Lord Reid.

20. [1957] 1 All.E.R. 234 at p.256. The facts in this case were briefly as follows: The executive council of the union rejected the recommendation of a district committee that the plaintiff should be expelled for refusing to join a one-day strike. The district committee subsequently threatened to withdraw all labour from employers who engaged him, although it had no power to call a strike. In fact pressure by the defendants led to his losing a number of jobs which he obtained.

(c) Civil Conspiracy

The tort of conspiracy was developed by the judges in the second half of the nineteenth century.

The principle elements of the tort of conspiracy are:

(i) an agreement between two or more persons (ii) to effect an unlawful purpose OR a lawful purpose by an unlawful act or means (iii) resulting in damage to the plaintiff.¹

It should be noted that there is only a cause of action where the conspirators do acts in pursuance of their agreement to the damage of the plaintiff.²

Where the act³ or means employed are tortious in themselves, it will not usually be necessary to invoke the law of conspiracy at all, for the defendants can then be sued, jointly or severally, in respect of the tort or torts they have committed.

But a combination may come within the law of conspiracy, even though neither the act nor the means are in themselves either criminal or tortious, the purpose of the combination may merely be unlawful. Where the purpose is to damage a person in his trade, business or employment and damage results, there is prima facie an actionable conspiracy.

1. See Crofter Hand Woven Harris Tweed Co. v. Veitch [1942] A.C. at p.440 per Viscount Simon L. C., at p.495 per Lord Porter.

2. See per Lord Wright in the Crofter case, *supra*, at pp.461, 471. Conspiracy may be both a crime and a tort. But the crime is constituted by the mere agreement, see *ante*, p.6.

3. For example to induce a breach of contract is an unlawful act. However, if the inducement of the breach was in contemplation or furtherance of a trade dispute s.3 affords protection, see *ante*, p.14.

In the Crofter case it was held : "What amounts to an unlawful purpose in this context cannot be precisely defined, but unless the real and predominant purpose is to advance the defendant's lawful interests in a matter where he honestly believes that those interests would directly suffer if the action taken against the plaintiff were not taken, a combination wilfully to damage a man in his trade is unlawful."⁴ Thus, where the acts done in combination are lawful acts, the determining factor is the presence or absence of intention to injure,⁵ that is to say, to cause wrongful harm and malevolence is not, it seems an essential element of the tort of conspiracy.⁶

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4. See per Lord Simon L.C. at p.446. Before this decision, great difficulty had been experienced in explaining and reconciling dicta in three House of Lords cases: Mogul Steamship Co. v. McGregor Gow & Co. [1892] A.C.495; Allen v. Flood [1898] A.C.1 and Quinn v. Leatham [1901] A.C.495. The Crofter case has resolved the problem presented by these cases, and the interpretation of the ratio decidendi of them given in the Crofter case is accepted as canonical.
 5. Up to 1964 it was believed that a single individual may act with the purpose of injuring another, provided he does nothing unlawful (See Mayor of Bradford v. Pickles [1895] A.C.587) but two or more persons may not. But this seems doubtful after Rookes v. Barnard Lord Devlin remarked in this case: "If one man albeit by lawful means, interferes with another's right to earn his living or dispose of his labour as he will and does so maliciously that is, with intent to injure without justification, he is, if there is such a tort, liable in just the same way as he would undoubtedly be liable if he were acting in combination with others. The combination aggravates but is not essential." See [1964] 2 W.L.R. p.320. In Rookes' case they held that there is "such a tort" see post, pp.23 f.
 6. See Crofter case supra at p.471, per Lord Porter.

Defences

(i) It is a good defence to show that the predominant purpose of the defendants was to protect or further their own interests e.g. interests of the union. Thus motive is the test of legality. Lord Simon said in the Crofter case : "The test is not what is the natural result to the plaintiffs of such combined action, or what is the resulting damage, which the defendants realise, or should realise will follow, but what is in truth the objects in the mind of the combiners It is not consequence that matters, but purpose If there is more than one motive actuating them, liability must depend upon ascertaining the predominant motive."⁷ Of course, if the defendants contemplated or committed an unlawful act or employed unlawful means this is not a defence.

(ii) Liability for the tort of conspiracy is qualified by statute, where the acts are done in contemplation or furtherance of a trade dispute.⁸ It is provided in s.1 of the Trade Disputes Act, 1906, : "An act done in pursuance of an agreement or combination of two or more persons if done in contemplation or furtherance of a trade dispute should not be actionable if the act without such agreement or combination would not be actionable."

7. At p.445.

8. For "trade dispute" see ante, pp.15 f.

S.1 protects a conspiracy which has an unlawful purpose i.e. where the purpose of the combination is to injure the plaintiff's trade, business or other interests. A conspiracy which involves the commission of an unlawful act in most cases will remain unprotected.⁹ In the latter type of conspiracy the element of conspiracy is usually only of secondary importance since the unlawful act or means are actionable in themselves.

In cases where the unlawfulness of the act lies in the inducement of other persons to break a contract of employment or in interference with some other person's trade or business or employment, a further statutory immunity is conferred if the act is done in furtherance of a trade dispute. S.3 of the Trade Disputes Act, 1906, provides : "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his

9. For example a sit-down, stay down, or stay in strike is an agreement or combination to do an act which is itself actionable, namely trespass. In Rookes v. Barnard a rather narrow interpretation was given to this section. In this case Lord Reid said: "This section cannot reasonably be held to mean that no action can be brought unless the precise act complained of could have been done by an individual without combination. The section requires us to find the nearest equivalent act which could have been so done and see whether it would be actionable." See [1964] 2 W.L.R. p.282.

labour as he wills."¹⁰

It should be noted that s.3 does not protect inducement of breach of contract or interference with trade, business or employment where they are brought about by intimidation or other illegal means.¹¹

A combining party can be liable for conspiracy to intimidate by threats to break contracts, even though he did not himself have any contract to break. In Rookes v. Barnard S. was a union organiser who had no contract with B.O.A.C. he could therefore not be guilty of threatening to break his own contract. He had done what union officials often do in industrial disputes, he induced others to break their contracts. The first part of s.3 of the Act clearly protected him from liability for actually

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10. By s.3 it is no longer an actionable wrong, in contemplation or furtherance of a trade dispute, and in an otherwise lawful manner merely to induce some other person to break a contract of employment. Consequently, if such inducing is done in combination, s.3 preserves them from liability for their individual torts, and s.1 from liability for conspiracy. As regards interference with business, trade or employment the better view is still that this is not a wrong when committed by an individual unless he employed unlawful means. In the latter case if such interference is done in combination and in contemplation or furtherance of a trade dispute s.1 affords protection.
11. In Rookes v. Barnard the House of Lords held that a threat to break a contract amounts to intimidation. The second part of s.3 did not protect the union officials because their interference with Rookes' employment was brought about by intimidation. When the Trade Disputes Bill, 1965, becomes law there will not be a cause of action in such cases. The Bill provides that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only that it consists in his threatening - (a) that a contract of employment (whether one to which he is a party or not) will be broken or (b) that he will induce another to break a contract of employment to which that other is a party.

inducing breaches of these contracts. The question arose whether there can be liability for threats when there would be no liability for doing that which is threatened to be done. The House of Lords held that he was liable because he combined with others in the conspiracy to intimidate.¹²

12. This part of the judgement is certainly casuistic. It is obvious that once the Trade Disputes Bill (1965) is passed by Parliament an end will be made to this paradoxical situation. See note 10, above.

II Secondary Boycott

Secondary activity plays an important part in labour relations; it is an important weapon of the unions. The question arises how far is this permissible in Great Britain?

"In certain cases it is an actionable wrong to intimidate other persons with the intent and effect of compelling them to act in a manner or to do acts which they themselves have a legal right to do which cause loss to a third party. For example the intimidation of the third person's customers whereby they are compelled to withdraw their custom from him. Intimidation of this sort is actionable, as mentioned above, in certain classes of cases; for it does not follow that, because a third party's customers have a right to cease to deal with him if they please, other persons have a right as against the third party to compel his customers to do so. There are at least two cases in which such intimidation may constitute a cause of action : (1) When the intimidation consists in a threat to do or procure an illegal act; (2) when the intimidation is the act, not of a single person, but of two or more persons acting together in pursuance of a common intention."¹ As regards (1) if the act threatened is a crime or is actionable as a tort the threat is unlawful. But after Rookes v. Barnard if the

1. Salmond on the Law of Torts, (1961), 13th ed., Chap. 18, p.697; cited and approved in Rookes v. Barnard [1964], 2 W.L.R. p.311, per Lord Devlin.

act threatened is actionable as a breach of contract it is also unlawful.² "The essence of the offence is coercion. It cannot be said that every form of coercion is wrong. A dividing line must be drawn and the natural line runs between what is lawful and unlawful as against the party threatened. If the defendant threatens something that the intermediate party can legally resist, the third party likewise cannot be allowed to resist the consequences; both must put up with the coercion and its result."³ In D. C. Thomson & Co. Ltd. v. Deakin⁴ the Court of Appeal held that acts of a third party lawful in themselves do not constitute an actionable interference with contractual rights merely because they bring about a breach of contract, even if done with that object and intention.⁵ But if the intermediate party is threatened with an illegal injury,

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2. When the Trade Disputes Bill (1965) becomes law this will not be unlawful provided, of course, the act is done in contemplation or furtherance of a trade dispute. For Trade Disputes Bill (1965) see ante, p.21 footnote 11.
 3. Rookes v. Barnard [1964] 2 W.L.R. p.312, per Lord Devlin.
 4. [1952] Ch.646. The plaintiffs in this case were printers whose papers were supplied under contract with the B. company. The plaintiffs dismissed an employee who was a union member. His union called a strike of the union members employed by the plaintiffs. In support, the members of two other unions told B. Company that they might not be willing to deliver paper to the plaintiffs. The B. Company to avoid trouble, allowed deliveries to the plaintiffs to cease. Held: Plaintiffs were not entitled to an interlocutory injunction.
 5. Cf. Stratford v. Lindley [1964] 3 W.L.R. p.541.

the third party who suffers by the aversion of the act threatened can fairly claim that he is illegally injured. The wrong can be committed individually and in combination with others.⁶

As regards (2) it is one form of the tort of conspiracy, the type where the act and means employed are lawful but which has an unlawful purpose.⁷ Thus if the combiners were acting in contemplation or furtherance of a trade dispute they are protected by s.1 of the Trade Disputes Act, 1906. Moreover, where the predominant purpose of the combination is to advance the combiners' lawful interests and no unlawful means are employed no action lies.⁸

In Great Britain, therefore, if the union adheres to the rules of the game secondary activity is generally speaking not unlawful. If union officials go directly to the secondary employer as long as they do not threaten to do or procure an illegal act,⁹ this is not actionable. As regards the employees of the secondary employer if they threaten to go on strike or threaten that they will not

6. Rookes v. Barnard [1964] 2 W.L.R. p.312, per Lord Devlin.

7. For this type of conspiracy see ante, pp.17 f.

8. See ante, pp.19 f.

9. It should be remembered where there is a trade dispute by s.3 of the Trade Disputes Act, 1906, inducement of a breach of contract is not illegal.

handle the primary employers goods this will not be unlawful after the passage of the Trade Disputes Bill, provided it is done in contemplation or furtherance of a trade dispute. Union officials who induce them to do so clearly do not commit any wrong. Furthermore they can actually go on strike and cease handling the goods of the secondary employer as long as they do not commit a breach of contract and it is for a lawful purpose. In such cases even if it is for an unlawful purpose s.1 affords protection where there is a trade dispute; or in absence of a trade dispute where the predominant purpose of the combination is to advance the combiners' lawful interests also no action lies.

III Picketing

Picketing is a concomitant of a strike. A strike may be of little effect in enforcing the employees' demands if the employer is able to replace the strikers and resume normal production. To prevent this, unions resort to picketing. In addition it is a type of advertising. It informs the public that there is a strike or dispute and states the union's version of its cause. Picketing may take the form of persuading customers not to patronize the employer.

In Great Britain peaceful picketing is lawful. The question arises what is meant by "peaceful picketing".

The Conspiracy and Protection of Property Act, 1875, by s.7(4), makes it a criminal offence¹ to watch or beset a person with a view to compelling him to do, or abstain from doing some lawful act. This subsection is of general application it is not confined to disputes between employees and employers, nor to trade disputes. The offence is committed by either watching or besetting or both. The words "to watch or beset" are not defined in the Act. The duration of the watching is a matter of degree and entirely a question for the jury. Besetting may be a crime although of a very short duration. There must be wrongful compulsion. It is not quite clear what constitutes this act. Where there is a prosecution under s.7(4) the court must consider the character of the meeting and all

1. Punishable by a fine up to £20 or imprisonment up to three years. The amount of the fine seems out of date.

the circumstances, and must be satisfied that the parties were not acting merely for the purpose of peaceful picketing.²

As far as persons acting in contemplation or furtherance of a trade dispute are concerned, by virtue of s.2(1) of the Trade Disputes Act, 1906, they may attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

S.2(1) establishes a clear right of peaceful picketing in trade disputes.³ Picketing of the kind mentioned in the section is lawful in the civil as well as in the criminal sense. So far as civil liability is concerned its main effect is in establishing that attending for the purposes of the section does not constitute a trespass to the public highway or a common law nuisance.

The section is not confined to union activity; it applies to one or more persons acting on his or their own behalf, or on behalf of a trade union or of an individual employer or firm.⁴

2. For "peaceful picketing" see below.

3. For trade dispute see ante, pp.15 f.

4. The term trade union includes an employers' association. A limited company is, of course, included in the expression individual, employer, or firm.

Peaceful picketing may involve an attending of long duration. The sole tests of the legality of the attendance are its purpose and its manner.

Any wrong, other than trespass to the public highway, remains intact. If pickets enter or remain on private property without authority they are trespassers.⁵ This liability for trespass applies also to pickets who are normally entitled to use the premises as employees. For employees have the right to enter and remain upon their employer's premises only for the purpose of their work or for such other purposes as the employer may allow.⁶ If a picket commits a private nuisance by shouting, obstructing ingress or egress to premises, or otherwise seriously interferes with the enjoyment of the premises the section does not afford protection. However, where the picketing is done under the section some degree of nuisance seems to be justified.⁷

Criminal liability which may be involved in acts of picketing is unaffected. If a picket commits a public nuisance such as behaving in a manner calculated to cause

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5. It should be noted, however, that unless expressly prohibited from doing so, any person wishing to see another for any lawful purpose has his implied authority to call at his house in a reasonable manner and for that purpose, to use the private way leading to it.
 6. Employees participating in a sit down strike commit the tort of trespass.
 7. It was held in Ferguson v. O'Gorman (1937) I.R.620 (an Irish case) that continually marching to and fro in front of a shop window is protected by the section.

a breach of the peace, or unreasonably obstructing the highway the section does not afford protection. It was held in R. v. Lewis & Others⁸ that pickets are not entitled to obstruct the passage of vehicles by lying down in the highway in front of them. A mass gathering blocking the highway may still be a public nuisance.⁹ Any show of violence or any other unlawful threat likely to create fear in the mind of a reasonable man renders picketing unlawful and may make it criminal.¹⁰

The section applies to persuasion of a particular kind only. The section does not protect where the peaceful persuasion is directed to some object other than inducing a person "to work or abstain from working". For example, it is considered that it would not cover the picketing of a retail shop with the object of persuading customers to boycott it.¹¹ The section does not require that the information should have reference to the question of working or abstaining from working. If the pickets confine themselves to publishing, by placards or handbills or by word of mouth, accurate information as to the nature

8. See The Times, 9 Dec. 1947. Action arising out of the Savoy Hotel strike.

9. Thus mass picketing is unlawful.

10. For the meaning of "reasonable man" see Glasgow Corporation v. Muir [1943] A.C. 448, at p.457, per Lord Macmillan. However that case related to "negligence".

11. See Toppin v. Feron (1909) 43 I.L.T.R.190, 192. This point was not decided but Pallets L.C.B. said: "Preventing people going into the theatre is not, I think, within the saving clause of (the 1906 Act)".

of the dispute the section will cover them. Lord Citrine in his book expresses the opinion that it is probable that pickets would still be covered by the section if they were merely to invite as opposed to persuade the customers not to deal with the establishment.¹² The difficulty here is what pickets or those who instruct them might consider mere information judges might consider persuasion.

If the object of the picketing is to induce breaches of contract it will be unlawful. For example, it is unlawful to induce the breach of contracts of sale, hire or carriage of goods. As regards contracts of employment, by virtue of s.3 of the Trade Disputes Act, 1906, the inducing is not generally unlawful.¹³

In conclusion one can only say that the law regarding peaceful picketing is not clearly laid down.¹⁴

12. Citrine, Trade Union Law, second ed. (1960) p.464.

13. For s.3 see ante, p.14.

14. For further details see Citrine, Trade Union Law, second ed. (1960) pp.444 ff.

Chapter 3

Freedom to Organise in the U.S.A.

The Fundamental Right To Organise

In NLRB v. Jones & Laughlin Steel Corporation¹

- the decision in which the Supreme Court of the United States upheld the constitutionality of the National Labour Relations Act - Hughes C. J. said that the right of workers to organise labour unions was a "fundamental right". In NLRB v. Budd Mfg. Co.² the Court said that this right was "protected by the Constitution against governmental infringement (as distinguished from infringement by private employers), as are the fundamental rights of other individuals". The Court appeared to say that the protection was to be found in the First Amendment.³

A few States have constitutional provisions guaranteeing the right of employees to organise and to bargain collectively through representatives of their own choosing. A number of specific features of union organising,

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1. 301 US 1, (1937). NLRB is the abbreviation of National Labour Relations Board.
 2. 335 US 908 (1948). See also International Union U.A.W. v. Wisconsin Employment Relations Board 336 US 245 (1949).
 3. The first ten amendments make up the so-called Bill of Rights of the Federal Constitution. The First Amendment reads : "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievance".

involving rights of assembly and speech, have been held to be protected against state and local governmental interference.⁴

Whatever may be the fundamental nature of the right to organise it is clearly a statutory right under s.7 of the National Labor Relations Act.⁵ S.7 of the Act provides :

"Employees shall have the right to self-organisation to form, join, or assist labor organisations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organisation as a condition of employment as authorised in section 8(a)(3)."

S.2 of the Railway Labor Act (1926) makes it unlawful for a carrier to interfere with, influence or coerce employees in organising.⁶ In case those provisions are violated either criminal proceedings can be instituted or a petition lodged in the courts for injunctive relief.

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4. It has been held that the right to organise is protected by the Civil Rights Acts against interference by state agencies. See Condra v. Leslie & Clay Coal Co. 101 F. Supp.774 (D.C.Ky. 1952).
 5. The act, which was generally referred to as the Wagner Act, was originally adopted in 1935. See 49 Stat. 449, 29 U.S.C. s.151 et seq. It was extensively amended by the Labor Management Relations Act of 1947, known as the Taft-Hartley Act. See 61 Stat. 136, 29 U.S.C. s.141 et seq. Congress again amended the NLRA in 1959 by the Labor-Management Reporting and Disclosure Act, known as the Landrum-Griffin Act. See Public Law 86-257, 73 Stat. 519.
 6. 45 U.S.C.A. §§151-163, 181-188. It applies to railroads and their employees. In 1936 an amendment brought airlines within the scope of the Act.

About one-fourth of the states have labour relations statutes.⁷ Connecticut, New York and Rhode Island have Acts listing unfair labour practices of employers only, the rest specify unlawful labour practices by both employers and unions. In addition to the labour relations acts many states have laws regulating picketing and boycotts.

7. Because of the wide variations in these state acts, it does not appear appropriate to deal with them here.

Protection of Freedom to Organise

Unfair Labour Practices

1. General Observations.

Congress has taken steps to make an end to practices directed against the exercise of freedom to organise. Congress enumerates in s.8 of the NLRA¹ certain practices which are outlawed. These practices are expressly proscribed in order to protect and guarantee the right of organisation. They are called "unfair labour practices" which under s.10 of the Act the National Labour Relations Board, created by the Act in order to implement its policies, is empowered to prevent.

The NLRB² is the administrative agency created by Congress to enforce the NLRA. The principal duties of the NLRB are to conduct elections and designate representatives under s.9 of the NLRA and to investigate and process unfair labour practice charges under s.8 of the NLRA.

It was held in Polish National Alliance v. NLRB³ that the Board's jurisdiction under the Act extends to the full limits of the power of the federal government to regulate interstate commerce. Accordingly, the Board may assert jurisdiction over labour disputes with employers engaged in the manufacture or process of materials shipped in interstate commerce, with employers engaged in shipping

1. Abbreviation of National Labour Relations Act.

2. Hereafter also referred to as Board.

3. 322 US 643, 647

or transporting across state lines, or with retail employers selling goods which have passed from the stream of commerce. In NLRB v. Reliance Fuel Oil Corporation⁴ where Reliance sold locally fuel oil which it had purchased from the Gulf Oil Company, which had brought the oil in from other states, the Supreme Court held that by virtue of Reliance's purchases from Gulf, Reliance's operations and the related unfair practices 'affected' commerce within the meaning of the Act.

Potentially, the NLRB is given authority to exercise its jurisdiction over all but the smallest of business⁵ but the Board has never exercised the full measure of its jurisdiction.⁶ It has used its administrative discretion and established certain standards, based on the dollar volume of goods the employer buys from or ships to other states or the annual dollar volume of business he does, below which it declines to assert jurisdiction. S.14(c)(1) of the NLRA⁷ provides that the Board may continue to decline to assert its full jurisdiction provided that it does so by rule of decision or published rules, and provided that it does not raise the dollar-volume standards

4. 371 US 224 (1963).

5. See NLRB v. Fainblatt, 306 US 601 (1939).

6. See Guss v. Utah Labor Board, 353 US 1,3 (1957).

7. Subsection (c) was added by the Labor-Management Reporting and Disclosure Act, 1959.

prevailing on 1st August 1959.⁸ Regardless of the dollar-volume standards, the Board has had a longstanding policy of refusing to assert jurisdiction over certain industries.

The Act does not apply to agricultural labourers, domestics, employees of Federal, state and local governments, employees who are subject to the Railway Labor Act, independent contractors and supervisors.⁹ Thus these are not within the jurisdiction of the NLRB.

A body equivalent to the NLRB was not created under the Railway Labor Act. Violations of s.2 of the Act cannot be stopped by way of administrative procedure.¹⁰ Most probably it was considered unnecessary to create such a tribunal since unionism has reached a fairly mature state in that industry and thus very little litigation occurs.

8. Whenever a state law covers an area also regulated by a federal statute, problems of exclusive or concurrent jurisdiction and federal pre-emption arise. The extent to which this "federal pre-emption" has occurred or should occur is one of the most controversial and complex issues in the labour law field. See San Diego Unions v. Garmon, 359 US 236 (1959). The 1959 amendment to the NLRA (s.14(c)(1)) giving the states authority to handle cases rejected by the NLRB under its jurisdictional standards, resolved one of the most difficult of these problems.

9. The Labor Management Relations Act, 1947, has withdrawn the legislative protection given to supervisors. Supervisors may still join unions if they so wish, but they also may be discharged for doing so. See post, p.213.

10. For s.2 see ante, p.33.

2. Employer Unfair Labour Practices

S.8(a)(1) of the NLRA is a broad general provision. It gives to unions and employees legal protection against employer anti-union tactics. The section declares it to be unfair labour practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in s.7.⁽¹¹⁾ It has been held in NLRB v. Express Publishing Co.,¹² that a violation of subsection (2), (3), (4) or (5) of s.8(a) is also a violation of s.8(a)(1).¹³ But it should be noted that s.8(a)(1) may be violated on its own, independently of any other specific unfair labour practice.¹⁴ Any conduct on the part of the employer which is likely to influence the decision of employees to organise is suspect; it may be privileged but unless a justification is available it violates s.8(2)(1).¹⁵

An employer is responsible for unfair labour practices

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11. For s.7 see ante, p.33. Yellow dog contracts or documents (an agreement under which an employee undertakes not to join a union while working for his employer) are also made illegal and unenforceable by the Norris-La Guardia Act of 1932 (The Anti-Injunction Act.) They are unlawful under the Railway Labor Act.
 12. 312 US 426 (1941).
 13. For subsections (2), (3) and (4) of s.8(a), see post, pp.160 ff, pp.142 ff.
 14. In the first years after the NLRA came into force s.8(a)(1) on its own was rarely applied. Only in later years when employers began carefully to avoid specific unfair labour practices the NLRB began to revert to it.
 15. For s.8(a)(1) see post, pp.122 ff. See A. Cox Labor Law Cases & Materials, 4th ed., pp.175 ff.

committed by anyone acting directly or indirectly as his agent.¹⁶ Whether the specific acts were authorised or ratified by the employer is not controlling in determining whether a person was acting as agent.¹⁷ Thus employers may be accountable for the conduct of their foremen and managers¹⁸ and the discriminatory practices of their personnel managers.¹⁹

3. Union Unfair Labour Practices

The Taft-Hartley amendments remake s.7 of the NLRA by guaranteeing employees in addition to the right to form, join or assist labour organisations²⁰ the right to refrain from such activities.²¹ S.8(b)(1) of the NLRA declares it to be an unfair labour practice for a labour organisation or its agent to restrain or coerce employees in the exercise of rights guaranteed by s.7

16. See s.2(2) of the NLRA.

17. See s.2(13) of the NLRA. This provision was added by the Labor Management Relations Act, 1947.

18. See NLRB v. Beatrice Foods Co., 183 F2d 726 (1950) and NLRB v. LaSalle Steele Co., 178 F2d 829. (CA7, 1949).

19. See Olin Industries v. NLRB, 191 F2d 613, 616 (CA5, 1951).

20. The term 'labour organisation' means for the purposes of the Act any organisation of any kind, or any agency of employee representation committee or plan, in which employees participate and which exists for the purpose in whole or in part, of dealing with employers concerning grievances, labour disputes, wages, rates of pay, hours of employment, or conditions of work. See s.2(5) NLRA.

21. For s.7 see ante, p.33.

of the Act.²² By s.8(b)(4) of the Act various concerted activities to bring about unionisation are made unfair labour practices.²³

4. Procedure in Unfair Labour Practices Cases

A proceeding before the NLRB is initiated by a charge filed by an individual or by a labour organisation in a Regional Office of the NLRB.²⁴ The Board has no power to initiate proceedings. Charges and informal complaints are investigated by Field Examiners who belong to the staff of the Regional Office. The Field Examiner takes testimony and arranges a meeting of the parties; he has authority to come into the plant, require access to the records, and make whatever inquiries he may deem necessary. By this informal procedure a great many of the charges are disposed of.

If the case is not disposed of informally a formal

22. For s.8(b)(1) see post, pp. 75 ff.

23. For s.8(b)(4) see post, pp. 59 ff.

24. The charge may be against an employer or against a labour organisation or its agent. The Act contains a six-month statute of limitation, see 10(b) NLRA. Under s.10(e) and (m) of the NLRA priority handling must be given to cases involving secondary boycott, a hot cargo contract, organisational or recognition picketing and discrimination against individual employees. As a matter of policy the Board does not permit litigation of allegations of unfair labour practices in the pre-election phases of representation proceedings.

complaint is issued by the General Counsel.²⁵ The NLRB by s.10(j) of the Act can apply for a temporary injunction against the unfair labour practice, but the NLRB rarely takes this step and ordinarily the controversy proceeds to a formal hearing before a Trial Examiner.²⁶

The proceedings are conducted so far as practicable like judicial proceedings in the District Courts of the United States.²⁷ At the conclusion of the proceedings the Trial Examiner prepares his intermediate Report, which is in essence a review of the facts and a recommended decision.²⁸ After receiving a copy of the Report

25. The title is misleading because he does not advise the Board on points of law. Under s.4(d) of the NLRA he has final authority over the investigation and prosecution of unfair labour practices charges. The twenty regional offices of the NLRB are under the supervision of the General Counsel.

26. Trial Examiners are appointed by the NLRB, but under s.11 of the Administrative Procedure Act, they are independent of the Board in tenure and compensation and can be removed only for good cause established and determined by the Civil Service Commission.

27. See s.10(b) of the NLRA.

28. During 1961, the late President Kennedy submitted to Congress Reorganisation Plan No. 5, which had unanimous Board support but was rejected by a House vote. The object of the plan was to provide speedier processing of unfair labour practice by delegating decisional functions to the Board's trial examiners, subject to the provisions of s.7(a) of the Administrative Procedure Act. The plan reserved to the Board the right to review any such delegated action or decision upon the motion of two or more Board Members either on their own initiative or in response to a request for review by a party or intervener. For further details see 26th Annual Report of the NLRB, p.5. It seems a pity that the plan was rejected - must the mills of justice grind slowly!

parties are given an opportunity to file exceptions with the Board. If no exceptions are filed the Board will ordinarily adopt the Report as its own decision and order. But if exceptions are filed the Board will review the case on the record and briefs which the parties filed in support of their exceptions. An application may be made for oral argument before the NLRB, but it is seldom granted.

The decision of the Board is in the form of findings of fact, conclusions of law and an order. The order may be a dismissal of the complaint but where the Board finds upon the 'preponderance'²⁹ of the testimony that an unfair labour practice has been or is still committed it issues a cease and desist order which may be accompanied by an order for affirmative action such as reinstatement.

Orders of the Board can be enforced only by the United States Courts of Appeals³⁰ upon petition of the Board. A court order of enforcement is in the nature of an injunction, and failure to obey the order may be punished as a contempt. The Act provides no penalties for unfair labour practices. However, certain remedial orders of the Board, particularly orders reinstating employees with back pay, resemble penal sanctions in their effect.

29. See s.10(c) of the NLRA.

30. The United States is now divided into eleven judicial circuits (counting the District of Columbia as a circuit) with a United States Court of Appeals for each of the circuits.

Any person aggrieved by a final order of the Board may obtain a review of the order upon petition to the appropriate Court of Appeals.³¹

Recently it was held by the U.S. Supreme Court that both the successful charged party and the successful charging party have a right to intervene in the Court of Appeals proceedings which reviews or enforces Board orders.³²

The final possibility for review is to the United States Supreme Court upon petition for writ of certiorari. The Supreme Court has warned petitioners in Universal Camera Corporation v. NLRB³³ : " Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the Court of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." Denial of an application does not necessarily mean that the Supreme Court adopts the results reached in that specific case as a guide for its future action but it does adopt the result as the final outcome of this controversy.

31. See s.10(f) of the NLRA.

32. See Local 283, United Automobile Workers, AFL-CIO, v. Russel Scofield and Local 133, United Automobile Workers, AFL-CIO v. Fafnir Bearing Co. (US December 7, 1965) (No. 18 & 53).

33. 340 US 474 (1951).

Chapter 4

Statutory Protection and Limitations Concerning Labour's Right To Exert Economic Pressures in the United States

General Observations:

Although the NLRA was primarily concerned with guaranteeing employees the right to form, join and assist labour organisations and to bargain collectively through representatives of their own choosing, s.7 of the Act also guarantees the right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

"In the United States the right to engage in concerted activities has been used effectively in spreading union organisation."¹

1. Cox, Cases on Labor Law, 4th ed., p.282

I Lawful Strikes

It is obvious that an employer violates s.8(a)(1) of the Act if he punishes or otherwise exacts reprisals against employees who have gone on a peaceful, orderly strike for a legitimate purpose. S.8(a)(1) provides that it shall be an unfair labour practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in s.7.

S.13 of the Act preserves the right of employees to engage in lawful strikes. But what is meant by the term "lawful" in this connection? It is stated in the 23rd Annual Report of the NLRB (1959)² that the activities must have a lawful objective and must be carried on in a lawful manner.

Fairly clear are the cases in which the concerted activities are for an objective which is outlawed by the Act itself as a union unfair labour practice. It would not effectuate the policies of the Act to afford relief against employer reprisal to employees who were themselves violating the Act.³

Even though the objective is legal, the Act affords no protection if the concerted activity is tortious or criminal in nature.

Concerted activities which contravene a basic policy of the Act, such as the promotion of stable collective

2. At p.64.

3. See Local Union No. 1229 v. NLRB, 202 F2d 186 (CA6, 1952) and Hoover Co. v. NLRB, 191 F2d 380 (CA6, 1951)

bargaining relationships and the sanctity of collective agreements, have also been held to be unprotected. Employees who engage in such activities cannot complain about discharges for such activity. Examples are strikes and other refusal to work in breach of a collective agreement⁴ and "wild-cat" strikes in derogation of the authority of the authorized collective bargaining representative.⁵

Partial strikes of various varieties have been held to be unprotected concerted activities. In Elk Lumber Company v. NLRB⁶ it was held that 'slow down' was an unprotected concerted activity. In NLRB v. Montgomery Ward & Co.⁷ the court of appeals said: "While these employees had the undoubted right to go on a strike and quit their employment, they could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly to the employer's damage, to do other work."

4. See Joseph Dyson & Sons Inc., 72 NLRB 445 (1947)

5. See Harnischfeger Corp. v. NLRB, 207 F2d 575 (CA7, 1953). For "authorized collective bargaining agent" see post, pp. 62 f.

6. 91 NLRB 333 (1950).

7. 157 F2d 486 (CAS, 1946).

In International Union, UAWA-AFL v. Wisconsin Employment Relations Board⁸ the Court held that intermittent, unannounced, "quickie" strikes were not included in the concerted activities protected by s.7 of the Act.

As long as it is "for mutual aid and protection" even informal action without union organisation may be protected. In NLRB v. Washington Aluminum Co.⁹ seven unorganised employees were discharged when they walked off the job because of extremely cold working conditions. The Court held that they had been engaged in protected concerted activities, even though they failed to comply

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8. 336 US 245 (1949). In this case the leaders of the Union submitted to its members a plan for a new method of putting pressure upon the employer. The stratagem consisted of calling repeated special meetings of the Union during working hours at any time the Union saw fit. It was an essential part of the plan that this should be without warning to the employer or notice as to when or whether the employees would return. The device was adopted and the first surprise cessation of work was called in November, 1945. Thereafter and until March, 1946, such action was repeated on twenty-six occasions. The employer was not informed during this period of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them. As the activity was neither protected nor prohibited by the Federal Act, the states were held free to regulate it.
9. 370 US 9 (1962). See also Ohio Oil Co., 92 NLRB 1597 (1951). Cf. NLRB v. Office Towel Supply Co. Inc., 201 F2d 838 (CA2, 1953) and Joanna Cotton Mills Co. v. NLRB 176 F2d 749 (CA4, 1949). These cases did not involve collective withdrawal of labour but the same principle applies.

with the employer's rule requiring permission to leave and even though they did not present a specific demand on the employer to remedy the condition before they left.

In Cleaver-Brooks Mfg. Corp. v. NLRB¹⁰ the court of appeals held : " We do not hold as a matter of law that employees engaged in concerted activities must give formal or even informal notice of their purpose. However, where the employer from the facts in its possession could reasonably infer that the employees in question are engaging in unprotected activity, justice and equity require that the employees, if they chose to remain silent, bear the risk of being discharged "

In Mastro Plastics Corp. v. NLRB¹¹ the Court ruled that a strike in violation of a no-strike contract provision was lawful where it has been provoked by the employer's unfair labour practices, and that the 60-day notice and cooling-off period do not apply to a strike caused by serious unfair labour practices of the employer not involving contract issues.¹² This is a very important decision.

10. 264 F2d 637 (CA7, 1959).

11. 350 US 270 1956. For a discussion of the Mastro Plastics case see Cox, The Legal Nature of Collective Bargaining Agreements 57 Mich.L.Rev.1, 16 et seq.(1958).

12. In an effort to encourage the resolution of contract disputes through bargaining the NLRA lays down some strict procedures that must be followed before a party to a contract may engage in a strike or lockout over an attempt to modify or terminate a contract. See s.8(d) of the NLRA. Under s.8(d)(4) before modifying or terminating a contract the moving party must permit the contract to continue in full force and effect, without resorting to a strike or lockout, for 60 days after the original notice was given or until the expiration date of the contract, whichever occurs later. Employees who strike during the 60 days cooling-off period forfeit their status as employees under the Act and are not protected against being discharged or otherwise disciplined by the employer for participating in the strike.

In Mid-West Metallic Products, Inc.¹³ the union had agreed that it would not strike over grievances, including discharges, until it had exhausted the grievance procedure provided in its contract. This case was distinguished from the Mastro Plastics case on the following ground :
" Since the processing of a grievance could be completed in about 5 days, the union was in effect merely agreeing to suspend any strike action over a grievance for 5 days from the date that the grievance arose. Unlike the union in the Mastro Plastics case the instant union did not jeopardize its very existence by renouncing self-help against unfair labor practices for a substantial period of time. Accordingly we believe that the considerations, which led the Board and the Court to require an 'explicit' waiver of the right to strike against unfair labour practices are not applicable here "

In Arlan's Department Store¹⁴ a majority of the Board held that only strikes in protest against serious unfair labour practices should be held immune from general

13. 121 NLRB No. 164 (1958).

14. 133 NLRB 802 (1961).

no-strike clauses.¹⁵ Member Fanning dissented, expressing the view that all unfair labour practices are serious.

S.305 of the Labor-Management Relations Act, 1947, makes it unlawful for any individual employed by the federal government to participate in any strike. Any such individual shall be discharged immediately, shall forfeit his civil service status, if any, and shall not be eligible for re-employment by any branch of the federal government for three years. There is no record of any strike called by federal employees since the enactment of the Act in 1947.¹⁶

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15. If the strike activity violates a "no-strike" clause the union may be liable in damages. See Cunco Press, Inc. v. Kokomo Paper Handlers' Union No. 34,235 F2d 108 (CA7 1956). S.301 of the Labor-Management Relations Act, 1947, provides that "suits for violation of contracts between an employer and a labour organisation representing employees in an industry affecting commerce may be brought in any district court of the United States" (This section has established that a collective agreement is legally enforceable). The last part of the section provides that any money judgment rendered against a union is enforceable only against the union as an entity and against its assets and that the property of individual union member may not be taken to satisfy the judgment. Does this mean that where a union has breached a no-strike clause the employer can obtain an injunction against the strike? It was held in Sinclair Refining Co. v. Atkinson, 370 US 195 (1962) by the Supreme Court that in such cases the employer cannot obtain an injunction against the strike. The Court relied in its judgment on s.4 of the Norris-LaGuardia Act. For Norris-LaGuardia Act see post, pp.54 f
16. See U.S. v. U.M.W. and John L. Lewis, 330 US 258 (1947) which took place before the enactment of the Labor-Management Relations Act. State courts have authority to grant injunctions in strikes by employees of state or local governments.

Reinstatement of Strikers

Where a strike has been called because of the employer's unfair labour practices, the employer is not legally free to hire permanent replacements, and is obliged to reinstate the strikers upon their request.¹⁷ Where a strike is partially 'economic' and partially in response to the employer's unfair labour practice the same rule applies.¹⁸ It was held in Brown Radio Service & Laboratory¹⁹ that an unfair labour strike does not lose its character as such merely because economic reasons may have contributed or even precipitated the work stoppage. But it was held in NLRB v. Stackpole Carbon Co.²⁰ if the employer can show that the strike would have occurred despite his unfair labour practices, he may be absolved of a duty to discharge replacements in favour of strikers.

Where an unfair labour practice of the employer is a contributory cause of the strike, it will be treated as an unfair labour practice strike. The burden rests upon the employer to show that the strike would have taken place even if the unfair labour practice had not occurred.²¹

17. See NLRB v. Biles-Coleman Lumber Co., 98 F2d 197 (CA9, 1938).

18. See NLRB v. Barrett Co., 135 F2d 959 (CA7, 1943).

19. 70 NLRB 476 (1946).

20. 105 F2d 167 (CA3, 1939).

21. See NLRB v. Wooster Division of Borg-Warner Corp. 236 F2d 898 (CA6, 1956) applied on remand to the Board, 121 NLRB No. 186 (1958).



If unfair labour practices are first committed during the course of a strike, there arises a duty to reinstate strikers who have been replaced following the commission of the unfair labour practice.

If employees go out on strike for economic reasons²² and not because of any unfair labour practice on the part of their employer, the latter may replace them in order to keep his business running, and the strikers thereafter have no absolute right of reinstatement to their old jobs. If permanent replacements are hired before the strikers apply for reinstatement, the employer may reject the strikers application without violating the law.²³

In NLRB v. Resistor Corp.²⁴ the Supreme Court refused to extend the Mackay rule²⁵ but they emphasized that they were not questioning the continuing vitality of that rule. The question before the Court was whether an employer commits an unfair labour practice when he extends a 20-year seniority credit to strike replacements and strikers who leave the strike and return to work.

22. A strike to enforce economic demands, but the term also embraces a strike for recognition or organisation.

23. The rule was enunciated in NLRB v. Mackay Radio & Telegraph Co. 304 US 333 (1948). Generally referred to as the Mackay rule.

24. 373 US 221 (1963).

25. See supra, note 24. A new Board was appointed in 1961 which seems more favourably inclined towards unions. Lately the same tendency can be noticed from the judgments of the Supreme Court.

The Court speaking through Justice White held : " The Court of Appeals and respondents rely upon Mackay as precluding the result reached by the Board but we are not persuaded. Under the decision in that case an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers But Mackay did not deal with super-seniority, with its effects upon all strikers, whether replaced or not, or with its powerful impact upon a strike itself. Because the employer's interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers does not mean it also outweighs the far greater encroachment resulting from super-seniority in addition to permanent replacement."

II The Labour Injunction

For many years the usual response of an employer to boycotts, collective withdrawal of labour or picketing was to ask the court to issue an injunction against the union. In 1932 the Norris-LaGuardia (the Anti-Injunction) Act¹ was passed. For the first time the right to strike, to picket and to boycott were legislatively protected.

The Norris-LaGuardia Act prescribes limits on federal judicial power to grant injunctive relief in labour disputes. It should be noted that the Act applies only when the particular case involves or grows out of a labour dispute. The Act protects nine specific activities from the injunctive process; they include most of the usual self-help devices of employees or unions.² As regards other activities the Act forbids the federal courts to issue injunctions unless certain prior conditions are fulfilled. Among the conditions that must be fulfilled before an injunction may be issued is the condition that the petitioner must have made every reasonable effort to settle the labour dispute.³ Ex parte injunctions are not permissible.

1. 47 Stat. 70, 29 U.S.C. § 101-115.

2. See s.4 of the Act. Where a union combines with some non-labour group to effect some direct commercial restraint, and the activity violates the anti-trust laws, the Act does not afford protection. See Allen Bradley & Co. v. Local 3, I.B.E.W., 325 US 797 (1945).

3. S.8 of the Act. See Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western Railroad, 321 US 50 (1944).

In U.S. v. UMW and John Lewis⁴ the Supreme Court held that the Government might obtain an injunction against a strike directed at it as an employer operating an industrial property.

Seventeen states have followed the lead of Congress and passed 'little' Norris-LaGuardia Acts patterned after the federal law.

The amendments made to the NLRA by the Labor-Management Relations Act, 1947, and the Labor-Management Reporting and Disclosure Act, 1959, have to some extent brought the labour injunction back to the arena of the labour scene. Under s.10(j) and (1) of the NLRA, the Board is empowered, and in the case of some union unfair labour practices, directed to petition a federal District Court for a temporary restraining order.

S.10(1) of the NLRA provides that whenever it is charged that any person has engaged within the meaning

4. 330 US 258 (1946). At the time the coal miners were operated by the Government. When a strike took place in that industry the Government petitioned the federal court of the District of Columbia for an injunction. The court came to the conclusion that the term "employer" under the Norris-LaGuardia Act does not include the Government and granted the injunction. The U.S. Supreme Court affirmed the decision of the lower court. A discussion of this case can be found in R. F. Watt, The Divine Right of Government by Judiciary, 14 U.Chi.L.Rev.409 (1947).

of s.(4) (A), (B) or (C) of s.8(b)⁵ or s.8(e)⁶ or s.8(b)(7)⁷ the preliminary investigations of such charge shall be given priority over all other cases. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition a district court of the U.S. for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. The section further provides that upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any provision of law. The section contains a proviso in which it is stated that no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. In a proviso which was added by the Labor-Management Reporting and Disclosure Act, 1959, to the section, it is stated that such regional attorney or

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5. S.8(4)(A)(B) and (C) outlaws most secondary activity i.e. secondary boycott, secondary strikes and secondary picketing. See post, pp.59 ff.
6. S.8(e) outlaws hot-cargo agreements. See post, p.60.
7. S.8(b)(7) outlaws organisational and recognition picketing. See post pp.71 ff.

officer shall not apply for any restraining order under s.8(b)(7) if a charge against the employer under s.8(a)(2)⁸ has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue.

By s.10(j) of the NLRA the Board is empowered upon issuance of a complaint that any person has engaged or is engaging in an unfair labour practice to petition a district court of the U.S. for appropriate temporary relief or restraining order. Upon the filing of any such petition the court has jurisdiction to grant the Board such temporary relief or restraining order as it deems just and proper.⁹

Thus the Norris-LaGuardia Act does not stand in the way of injunctions against unfair labour practices when they are sought by the NLRB.¹⁰ It is important to note that a private party is not permitted to obtain an injunction against an unfair labour practice.

Under the Labor-Management Relations Act, 1947 a U.S. District Court has jurisdiction to issue an injunction

8. S.8(a)(2) makes it an unfair labour practice for an employer to dominate or interfere with the formation or administration of any union or contribute financial or other support to it. See post, pp.160 ff.

9. It is obvious that this provision is vital; immediate intervention is sometimes absolutely necessary. It should be noted that this section is not merely directed against union unfair labour practices but employer unfair labour practices as well.

10. See s.10(h) of the NLRA.

on application of the Attorney General of the United States, in certain circumstances where a so-called national emergency strike is involved.¹¹ A challenge to the constitutionality of these provisions and to an injunction issued under them in the 1959 basic steel strike was rejected by the Supreme Court.¹²

11. See ss. 206-210 (inclusive) of the Labor-Management Relations Act. See also, Kramer, Emergency Strikes, 11 Lab. L. J. 227 (1960).

12. See Steelworkers v. U.S., 361 US 39 (1959).

III Secondary Boycott

The Famous S.8(b)(4) of the NLRA

The primary objective of s.8(b)(4) of the NLRA is the prohibition of secondary boycotts and certain types of strikes. The section does not speak generally of secondary boycotts, it describes and condemns specific union conduct directed towards specific objectives.¹ Subsections (i) and (ii) of s.8(b)(4) list the type of activity banned and subsections (A), (B), (C) and (D) of s.8(b)(4) enumerate the prohibited objectives. If a union engages in any of the kinds of activity mentioned in subsections (i) and (ii) for one of the purposes mentioned in subsections (A), (B), (C) and (D) it commits an unfair labour practice.

A union or its agents commits an unfair labour practice if it engages in any of the following kinds of activity:

- (i) induces or encourages any individual² employed by any person³ engaged in commerce or in industry affecting commerce to strike or to refuse to perform services;
- (ii) threatens, coerces or restrains any person⁴ engaged in commerce or in an industry affecting commerce;

1. Per Mr. Justice Frankfurter in Local 761, Electrical Radio and Machine Workers v. NLRB.

2. Thus the inducement of a single secondary employee falls within the ban of the section.

3. The Supreme Court has held that a railroad and a governmental unit such as a county, are persons within the NLRA and hence that they have standing to seek relief against union conduct which violates s.8(b)(4).

4. A term, which, of course, includes an employer.

for any of the following purposes:

- A. Forcing any employer or self-employed person to join any union or employer organisation or to enter into an agreement which is prohibited by s.8(e).⁵

Thus a secondary as well as primary strike, called by a union, whose purpose is to force an employer or self-employed person to join a union or employer organisation is a union unfair labour practice.

S.8(e) makes it an unfair labour practice for any union and any employer to enter into an agreement whereby such employer ceases or refrains from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person. Furthermore such an agreement is void and unenforceable. This type of agreement is called "hot cargo agreement".⁶ Thus a strike, called by a union, for a hot-cargo agreement is a union unfair labour practice. Likewise if a union threatens or coerces an employer to enter into such an agreement it commits an unfair labour practice.

- B. Forcing any person to cease dealing in the products of any other producer, processor or manufacturer or to cease doing business with any other person.

5. See s.8(b)(4)(A).

6. There are certain exceptions. The provisos to s.8 (e) allow unions engaged in the construction and garment industries to enter into modified types of hot cargo agreements under certain conditions without violating the law.

This clearly outlaws the secondary boycott. It is unlawful for a union to go to a neutral employer⁷ and by threats to get him to stop doing business with the employer with whom the union has a dispute. Furthermore it is a violation of the Act for the union to induce or encourage employees of a neutral employer to strike or refuse to perform services as a means of putting pressure on the neutral employer to stop doing business with the employer with whom the union has a dispute.

Forcing another employer to recognise or bargain with a union as the representative of his employees unless such union has been certified as the representative⁸ of such employees under the provisions of s.9

If a union calls out employees to strike for the purpose of forcing not their employer but another employer to recognise a union not certified by the NLRB, it violates the Act.

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7. When a union charged with a violation of s.8(b)(4) is able to show that the neutral employer is in fact an 'ally' the Board will dismiss the complaint. Neutral employees have been held to be allies for secondary boycott purposes on the basis of their corporate relationship or of the performance of struck work turned over by the employer, with whom the union has a dispute, to the neutral employer. See Miami Newspaper Pressman's Local 46 v. NLRB 322 F2d 405 (CA DC, 1963) and Bonds v. Metro Fed. of Architects, 75F Supp. 672 (DCSDNY 1948).
8. See s.8(b)(4)(B). This clause contains a proviso which provides that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." Primary activity is where the strike or picketing is limited to the scene of the primary dispute. For s.9 see post, pp.62 f.

- C. Forcing an employer to recognise a union as bargaining agent if another union already has been certified to represent his employees.⁹

A basic objective of the NLRA is to protect the right of employees to bargain collectively with their employer through a representative of their own choosing.¹⁰ An employer is under a duty to bargain in good faith with a union representing a majority of his employees in an appropriate bargaining unit on the one hand, and a union representing a majority of the employees in an appropriate bargaining unit is obligated to bargain in good faith with the employer on the other.

Subject to certain limitations imposed¹¹ by the NLRA the Act confers on the NLRB¹² the authority to decide in each case whether the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof.

The NLRB is entrusted with conducting representation elections. Representation proceedings begin with filing a representation petition at the Board offices.

9. See s.8(b)(4)(C). This section should be read in conjunction with s.8(b)(7) which makes it virtually obsolete. See post, pp.71 ff.

10. See s.7 of the NLRA.

11. For the limitations imposed by the Act see the proviso in s.9(b).

12. S.701 of the Labor-Management Reporting and Disclosure Act, 1959, allows the NLRB to delegate authority to its regional directors to determine appropriate bargaining units and other questions of representation, to direct elections and to issue certifications.

If the petition has been filed by a union, there must be a showing that at least 30 per cent of the employees involved have indicated that they wish to be represented by the petitioning union. An employer may file a petition when one or more unions have asked it for recognition as the bargaining representative. If a majority of the employees vote for the union, the Board certifies it as their bargaining agent.

A question of representation may also be raised by petition for decertification of a bargaining agent which has been certified, or is currently recognised by the employer. A showing of at least 30 per cent interest of the employees in the bargaining unit must accompany the decertification petition.¹³

When a union loses a certification or decertification election 12 months must elapse before another representation election may take place.¹⁴ The Board will not direct an election among employees covered by a valid collective agreement except under certain circumstances. The contract-bar rules¹⁵ insist that for the contract to be effective it must be in writing, properly executed and binding on the parties and of no more than reasonable duration.

13. See s.9(c)(1)(A)(ii).

14. See 9(c)(3).

15. Rules applied by the NLRB in determining when an existing contract between an employer and a union will bar representation election sought by a rival union.

Thus the NLRA establishes a procedure for the resolution of disputes over organisation and representation and the freely expressed wishes of the majority in the bargaining unit is controlling. Before 1947 the law did not proscribe picketing after a union had been certified by the Board. Naturally a union which had been rejected in the election or did not stand for election very often seized the opportunity and after the election began to picket the plant.¹⁶ The employer was caught in the middle because under the Norris-LaGuardia Act the activity was immune from federal injunctive process. To make an end to this s.8(b)(4)(C) was enacted. When picketing which is proscribed by s.8(b)(4)(C) occurs, the Board, on a complaint filed with it by the employer, is required to seek an injunction to enjoin the picketing.

- D. Forcing an employer to transfer work from one group of employees to another group.¹⁷

The provision was enacted in order to make an end to pressures exerted by unions where there was a job demarcation dispute. An unfair labour charge involving a job demarcation dispute must be handled differently from charges alleging any other type of unfair labour practice.

16. This type of picketing occurred more frequently between 1935-1955 when the AFL and CIO were rival federations.

17. See s.8(b)(4)(D).

Consumer Picketing and Publicity

S.8(b)(4) contain a proviso¹⁸ designed to preserve a union's right to publicise a dispute with an employer. It is stated in the proviso that nothing in the section shall be construed to prohibit publicity, "other than picketing" for the purpose of advising the public that a product produced by an employer with whom the union has a dispute is being distributed by another employer. But an important condition is attached to this right to publicise the dispute, namely, the publicity must not induce employees of other employers to refuse to pick up, deliver, or transport any goods or to refuse to perform any services at the distributor's establishment.

The Board and the courts had to deal with the question whether "other than picketing" meant that all peaceful consumer picketing was proscribed by s.8(b)(4). In NLRB v. Fruit & Vegetable Packers & Warehousemen¹⁹ the question before the Supreme Court was whether the unions had violated s.8(b)(4)(ii)(B) of the Act when they limited their secondary picketing of retail stores to an appeal to the customers of the stores not to buy the products of certain firms against which one of the unions was on strike. The Supreme Court held that this was not violative of s.8(b)(4)(ii)(B).

18. See s.10(K) of the Act.

19. 84 SupCt. 1063 (1964).

Damages

Under s.303 of the Labor-Management Relations Act, 1947, a union may be sued for damages by a private party in a United States District Court for engaging in conduct proscribed by this section.²⁰ The unlawful conduct is the same as the unfair labour practices which are described in s.8(b)(4).

An action may be brought under s.303 regardless of whether unfair labour practice charges are filed with the NLRB, or if unfair practice charges are filed with the NLRB a damage suit may be brought at the same time. Damages may be awarded even though there has been a finding that no unfair labour practice was committed.²¹ The two procedures are independent of another.

Punitive damages cannot be awarded under s.303. In Teamsters, Local 20 v. Morton²² the Supreme Court unanimously held that state law has been displaced by s.303 in private damage actions based on peaceful union secondary activity. Consequently, the court declared that the District Court was without authority to award

20. Even though the usual federal court requirement that an amount of at least \$ 3,000 must be in controversy is not satisfied, damage suits under s.303 may be instituted. However, the secondary activity must occur in an industry or activity affecting commerce for jurisdiction to exist under s.303. In determining whether commerce is affected, the business of both the primary and secondary employers may be considered.

21. See United Brick & Clay Workers v. Deema Artware 198 F2d 637 (CA6, 1952).

22. 84 SupCt. 1253 (1964).

punitive damages. The Court noted that in cases involving union violence, state law has been permitted to prevail by reason of controlling considerations which were entirely absent in this case.

IV Picketing

In Thornhill v. Alabama¹ the Supreme Court held that the dissemination of information and opinions concerning a labour dispute and advice given to the public not to patronise or do business with a particular employer are within the area of free speech protected by the Constitution of the United States against governmental abridgment. The court relied in its decision on the First and Fourteenth Amendment of the Constitution.² The Thornhill case established the right of employees to picket peacefully for lawful objectives without interference on the part of any state.

In Milk Wagon Drivers' Union of Chicago v. Meadowmoor Dairies Inc.³ - where the picketing started peacefully for a lawful purpose and then exploded into a reign of terror the Supreme Court held that the state courts may enjoin isolated instances of picket line violence, but they have no authority to issue injunctions so broad as to prohibit the peaceful phase of picketing. In this case the decision of the state court was upheld because

1. 310 US 38 (1940).

2. For the First Amendment see ante, p.32. The Fourteenth Amendment, s.1 states: "All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

3. 312 US 287 (1940)

the good and bad part of the picketing were so enmeshed that it was impossible to separate the lawful from the unlawful acts.

It was held in Carpenters and Joiners Union of America v. Ritter's Cafe⁴ by the Supreme Court that picketing must be confined to the immediate area where the labour dispute has arisen in order to be lawful. In AFL v. Swing⁵ the main issue was whether the relationship of employer-employee must exist before peaceful picketing will be permitted. The Supreme Court per Justice Frankfurter said that if a labour dispute existed strangers having no relation with the employer might exercise the right of free speech by picketing.

Whenever the picketing by unions was directed to objectives which were contrary to the state public policy (expressed by state courts or by state legislation) the Supreme Court has sustained the constitutionality of injunctive relief against picketing despite its peaceful conduct.

In Teamsters v. Vogt⁶ the unions after having failed in their effort to make the plaintiff's employees join them, picketed at the entrance of the plaintiff's premises. A Wisconsin state court enjoined the picketing and the decision was affirmed by the Supreme Court of the State

4. 315 US 722 (1942).

5. 312 US 321 (1940).

6. 354 US 284 (1957).

on the ground that the picketing was planned to coerce the employer to interfere with its employees in their right to join or refrain from joining, a union. The decision was affirmed by the U.S. Supreme Court.

Mr. Justice Frankfurter said : "The mere fact that there is picketing does not automatically justify its restraint without an investigation into its conduct and purposes; neither state courts nor state legislatures can enact blanket prohibitions against picketing The policy of a state prohibiting a union from picketing to coerce an employer to put pressure on his employees to join a union is valid."

When lawful objectives have been sought through violent picketing restraining orders have been sustained by the Supreme Court. In cases where isolated incidents of violence had occurred the court has modified the injunction to prohibit only the violent phase of picketing.

As has been mentioned before s.8(b)(4)(C) of the Act makes it an unfair labour practice for a union or its agent to engage in or encourage a strike (this includes picketing) for the purpose of forcing an employer to recognise a union as bargaining agent if another union already has been certified to represent his employees.⁷ This section was enacted to proscribe jurisdictional picketing but it was not precise enough and could, therefore, be circumvented in certain situations.

7. See ante, pp.62 ff.

The Board gives employees both the right to bargain through representatives of their own free choosing and the right to refrain from collective bargaining. Therefore the ballot gives the employees the right to vote 'yes' or 'no' on the question of representation by a union. If a majority of the employees voted 'no' in a Board election, the rejected union and other unions if they wished to do so, could lawfully picket the plant and s.8(b)(4)(C) did not afford any protection.

In cases where an uncoerced majority of the employees selected a union as their bargaining agent, which was recognised by the employer, without the formality of an election, other unions could still picket the plant without committing an unfair labour practice.

A new section, s.8(b)(7), was inserted in the NLRA by the Labor-Management Reporting and Disclosure Act in 1959, which deals with recognition and organisational picketing.⁸

S.8(b)(7) makes it unlawful for a union to picket "to force or require" the employer to recognise the union or the employees to accept it as a bargaining agent where :

- (A) Another union has been recognised as bargaining agent, and the NLRB would not conduct an election because a question of representation does not exist, or
- (B) A valid election has been conducted within the preceding 12 months, or

8. So far the restrictions placed on recognition and organisational picketing have not been challenged by unions on constitutional grounds.

(C) The picketing has been conducted for a reasonable period of time (not to exceed 30 days) and no election petition has been filed.

The section closes the above mentioned loopholes. In cases where another union has not been recognised as bargaining agent by the employer and no valid election has been conducted within the preceding 12 months a union can picket for 30 days and when it files an election petition it can go on. If the picketing continues beyond the 30 days without a representation petition having been filed, the Board, on a complaint filed with it by the employer, is required to seek an injunction to enjoin the picketing.⁹ A proviso to s.10(1) prohibits the Board from seeking injunctive relief in a s.8(b)(7) case whenever a meritorious charge has been filed alleging that the employer has dominated or interfered with a union in violation of s.8(a)(2) of the Act.¹⁰

S.8(b)(7) restricts the right to organise. Sometimes a union is rejected in a Board election because employees are afraid to displease their employer and therefore vote 'no' in the election. The Supreme Court has stressed that peaceful picketing is a form of free speech. It seems that in such cases the union is justified in opening its mouth but s.8(b)(7)(B) shuts it. Before the enactment of the section, if a union failed

9. See s.10(1) of the Act and ante, pp.55 ff.

10. For s.8(a)(2) see post, pp.160 ff.

in its campaign to enlist members and no other union had been certified by the NLRB it could resort to picketing, now it can do so only if no other union has been recognised and there was no election within the preceding 12 months and then the period allowed is limited.

However, a very important exemption to the 30 day picket rule has resulted from a proviso in s.8(b)(7)(C) which allows picketing 'for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a union, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. It should be noted that the proviso pertains to subsection (C) only.

Informational picketing which lacks an organisational or recognitional purpose is outside the reach of s.8(b)(7)(C) even though it causes refusal to work.¹¹

In defining the term 'effect' in the proviso to s.8(b)(7)(C) the Board has looked to the actual impact on the employer's business, rather than to a quantitative test based solely on the number of deliveries not made or services not performed, when determining whether to remove the informational picketing from the proviso's protection. If the picketing disrupts, interferes with or curtails an employer's business a violation takes place. This is a question of fact to be decided in the light of the facts in each case.

11. See Local 89, Chefs, Cooks, Pastry Cooks and Assistants (Stork Restaurant) 130 NLRB 67 (1961).

Very often the picketing has a number of objectives. Does a violation of s.8(b)(7) take place if one of the objectives of the picketing is to gain recognition? This question was dealt with in Local 840, Hod Carriers Union (BlinneConstruction Company).¹² The Board held in this case that s.8(b)(7)(C) applies to a majority union which has not been certified. The fact that organisational or recognition picketing is also for the purpose of protesting against an employer unfair labour practice does not prevent violation of s.8(b)(7)(C). However, a union may continue organisation or recognition picketing, without filing a petition for an election, if it files a refusal-to-bargain charge and the General Counsel finds it meritorious and issues a complaint.

In Bldg. & Construction Trades Council (Sullivan Electric Co.)¹³ the Board held where the union's picketing is solely to compel the employer to comply with an existing valid collective agreement it is not unlawful picketing for recognition within the meaning of s.8(b)(7)(C) of the Act.

12. 135 NLRB 1153 (1962).

13. 146 NLRB 138 (1964).

V Coercion by Labour Organisations

S.8(b)(1)(A) of the NLRA provides that it shall be an unfair labour practice for a labour organisation or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7 : "Provided that this paragraph shall not impair the right of a labour organisation to prescribe its own rules with respect to the acquisition or retention of membership therein "¹

By s.8(b)(1)(A) Congress sought to fix the rules of the game to ensure that strikes and other organisational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force or economic reprisal. In this section

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1. This section has been added by the Taft-Hartley amendments. For s.7 see ante, p.33. S.8(b)(1)(A) follows the phraseology of s.8(a)(1) of the Act except omitting the words "interfere with". For s.8(a)(1) see post, pp.122ff. In its original form the amendment followed the exact words of s.8(a)(1), see Cong.Rec. pp.4136 ff. But the deletion of the words "interfere with" does not seem to have an effect on court decisions. The proviso to the section should not be overlooked. In UAW Local 238 (Wisconsin Motor Corp), 145 NLRB 109 (1964) the Board held that a union did not unlawfully restrain or coerce employees in the exercise of their statutory rights by imposing fines on certain of its members who exceeded production earning ceilings for piece work in violation of the union rule, since the union's rule was only enforced against its members and employees were free to refrain from becoming union members. Under the circumstances the imposition of the fines constituted internal union action within the protection of the proviso to s.8(b)(1)(A) of the Act.

Congress was aiming at means, not at ends.² It should be noted that the section does not apply only to strike action and picketing but also to other organisational activities of employees.³

In NLRB v. Teamsters Union 639⁴ the Supreme Court held that s.8(b)(1)(A) is not a general clause and that the provision of the section prohibiting union tactics that coerce or restrain employees in the exercise of the right to join or refrain from joining a union is limited to acts of violence, intimidation, and reprisal or threats of such acts.

By s.8(b)(1)(A) of the Act the following conduct by pickets on the picket line and elsewhere is unlawful : threats of violence against nonstrikers, blocking entrances, trailing nonstrikers, assaulting nonstrikers, and damaging the house of a nonstriker.⁵

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2. However, s.8(b)(1)(A) was not intended to confer on the Board general police power covering all acts of violence by a union, but rather was intended to bring within its scope only such acts of violence as are directed against the exercise by employees of rights guaranteed by s.7. In NLRB v. Furriers Joint Council, 224 F2d 78 (CA2, 1955), an employee worked overtime for another employer, in violation of the collective agreement with his principal employer. For this he was assaulted by a union agent. The court of appeals held although the assault was coercion, the employee was not acting in the rights under s.7, and that conduct in breach of a valid collective agreement is unprotected.
 3. See, for example, Personal Products Co, 108 NLRB 1129 (1954) and NLRB v. Die and Tool Makers Lodge No. 113, AFL, 231 F2d 298 (CA7, 1956).
 4. 362 US 274 (1960) generally referred to as the Curtis case.
 5. See Packinghouse Workers, 123 NLRB (No. 53) (1959) ; Steelworkers, 123 NLRB (No. 35) (1959); Eagle Mfg. Corp., 112 NLRB 74 (1955), Tungsten Mining Corp, 106 NLRB 903, (1953).

The Board is authorized under s.10(c) of the Act to issue a cease and desist order for a violation of s.8(b)(1)(A). It is important to note that the states are not barred from exercising regulatory power in those cases in which violence, threats of violence, or mass picketing may be present.⁶

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6. In Local 513, Operating Engineers (Long Construction Co.) 145 NLRB No. 57 (1963) the Board made the following observations: "We are dealing here with conduct which, though violative of the Act, is not beyond the reach of State power. The Act generally pre-empts State authority with respect to conduct within its purview. However, it does not pre-empt State authority to deal with breaches of the peace stemming from the use of force and violence in labor disputes. The States can enjoin such conduct, and they can remedy the consequences of such conduct." For "unpeaceful picketing" see ante, pp.68 f.

Chapter 5

Freedom to Organise in the Federal Republic of Germany

The Basic Right to Organise

In the Federal Republic of Germany the right to organise is guaranteed by the Constitution i.e. the Basic Law.¹

Art.9(3) of the Basic Law provides :

"The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades and professions. Agreements which restrict or seek to hinder this right are null and void; measures directed to this end are illegal."²

What rights does an employee derive from the article?

He has the right to participate in the formation of any trade union and to join any existing trade union.³

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1. Basic Law for the Federal Republic of Germany; Bonn Charter (1949) hereafter referred to as Basic Law. The English text quoted here is a translation which was approved by the Allied High Commission in Germany.
 2. Art.142 of the Basic Law provides that provisions in the Laender (provinces) constitutions guaranteeing basic rights which are not inconsistent with Art.1-18 of the Basic Law remain in force. The Basic Law of the Land is only then applicable if the protection of the Land's constitution is less than that of the Federal Constitution. For example Art.36 of the constitution of Hesse guarantees freedom to organise to trade unions and employers' associations only, here Art.9(3) of the Basic Law of Bonn steps in and enlarges the scope.
 3. By s.152 of the Industrial Code (Gewerbeordnung) certain combinations are not forbidden. But, of course, Art.9(3) goes much further and the right is guaranteed to everyone i.e. all employees.

This right is safeguarded and protected by the Basic Law.⁴

Art.9(3) is a basic right, and is therefore like the rest of the basic rights protected by the Constitution (the Basic Law) against governmental infringement.

Art.9(3), since it is a basic right, can be amended only by a law which expressly amends or supplements the text thereof. Such a law requires the affirmative vote of two-thirds of the members of the Bundestag and two thirds of the votes of the Bundesrat. An amendment affecting the basic principles laid down in the article is inadmissible.⁵

Art.9(3) is not a declarative or programmatic provision; it binds the legislature, the executive and the judiciary as directly enforceable law.⁶

Administrative measures taken by the State which restrict or seek to hinder the right to organise are illegal.

4. The article also protects the right of employers to form and to join employers' associations. Moreover, it is now generally accepted that Art.9(3) guarantees to the organisation as such, the right to exist and function. Of course, this applies only to organisations which are an organisation within the meaning of Art.9(3) see post, pp.82 ff. Since this study is concerned with freedom to organise of individual employees the right of the organisation will be mentioned only when it affects the right of the individual.

5. See Art.79(3) and Art.19(2) of the Basic Law.

6. See Art.1(3) and limb 2 of Art.9(3).

For example if a public official⁷ is transferred from his post in order to stop his union activities Art.9(3) has been violated. An action to set aside such an administrative measure has to be lodged before the Administrative Court. In addition an unconstitutional administrative measure is also a breach of an official duty.⁸ The plaintiff is entitled to compensation which is payable by the Appointment Body.

There is a great difference between the guarantee of freedom to organise as against the State and its protection against a powerful group or person. Freedom to organise is not only protected by the Basic Law against governmental infringement but also against infringement by private forces (Privaten Mächten) e.g. a private employer or trade union.

Limb 2 of Art.9(3) provides that agreements which

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7. The term public official is used here for 'Beamte'. The present writer realises that this term is not adequate but there is no equivalent English expression. Civil servants and many employees employed in the public sector e.g. railways, hospitals, secondary schools are Beamte. Their status, service and loyalty are governed by public law. Public officials have the right to organise like the rest of employees, see post, p.82.
8. See Art.34 of the Basic Law and s.839 of the Civil Code (Bürgerliches Gesetzbuch). By s.839(1) a person injured by a public official's negligence has no claim against him, if he can obtain compensation elsewhere e.g. from the public authority which employs the negligent official.

restrict or seek to hinder the right are null and void;^{8a} measures directed to this end are illegal. It should be noted that agreements which restrict or seek to hinder in the exercise of the right to organise are null and void. This provision, among other things, makes the yellow dog document null and void. "Measures" means here not only administrative measures but also measures employed by private forces, e.g. an employer, which restrict or seek to hinder freedom to organise.⁹ Where the plaintiff alleges that a restriction has taken place there is no need to prove "intention". It is the fact that a restriction has actually taken place on which liability depends. It is quite immaterial whether the defendant intended to do so or not. But a mere attempt to hinder freedom to organise is also illegal even if in the specific case it did not bring about an actual restriction. It is obvious that in such cases the court has to look at the intention (animus) of the defendant.¹⁰

It is important to note that Art.9(3) expressly provides that freedom to organise is guaranteed to "everyone and all professions". Freedom to organise

8a. "Abreden" is translated here as agreements. Why the term "Abrede" (arrangement) and not the legal term agreement (Vertrag) was used cannot be learned from the wording of the article or from its legislative history. But there is a general consensus of opinion that in Art.9(3) the term "Abrede" is meant in the sense of agreement (Vertrag). See Hueck-Nipperdey, Lehrbuch des Arbeitsrecht, vol.II, 6th ed., 1957, (hereinafter cited as Hueck-Nipperdey II), p.96; v. Mangoldt-Klein, Das Bonner Grundgesetz, Kommentar, 2nd ed., 1957, (hereinafter cited as v.Mangoldt-Klein) comment V 12, concerning Art.9.

9. A detailed discussion of this is made in Chapter 8. See post, pp.167 ff.

10. See post, Chapter 8, pp.180 f.

is a general human right and has to be distinguished from freedom to associate;¹¹ the latter is not guaranteed to everyone but to Germans only.¹²

Freedom to organise is guaranteed to all professions.¹³ Hence individual professions cannot be excluded. The article applies to all professions and all professions are meant thereby, even public officials and domestics.

The reader by looking at Art.9(3) might get the impression that the article protects the right of employees to form and to join any type of labour organisation. But this is not the case. The article speaks only about organisations with certain characteristics. The essential characteristics are :

1. The aim of the organisation must be "to safeguard and improve working and economic conditions". It is the

11. See Art.9(1) of the Basic Law. Freedom to associate is not protected against infringement by private forces. See post, p.94 footnote 43.

12. Freedom to organise is guaranteed to aliens and stateless persons as well. Presumably while drafting the Constitution the importance of this part of the article was not conceived. Nowadays with foreign labour being common in the Federal Republic one should not overlook this provision.

13. Freedom to organise for "all professions" was for the first time guaranteed in the Weimar Constitution.

prevailing opinion of scholars¹⁴ that Art.9(3) refers chiefly to employers' associations and trade unions, notwithstanding that this cannot be learned from the text.¹⁵

It is now generally accepted that it is most desirable that an organisation should further working conditions on a collective basis, i.e. by concluding collective

14. Germany is a country of codified law, which means that only the provisions set forth in the constitution and in the different codes are considered law. A decision of a higher court is only the law of the particular case, and if the matter is remanded the lower court is bound thereby. However, decisions of higher courts are frequently cited, and quoted and also followed by lower courts, not as the "law" but because of their reasoning and persuasive force. Especially the Federal Labour Court through its decisions exercises a great influence on the lower labour courts. This happens because of certain provisions in the Labour Court Statute (1953). By that statute there is a right of appeal to the Federal Labour Court from the Land Labour Court if the Federal Court has not decided on the legal issue involved in the specific case, or if the decision of the Land Labour Court conflicts with a decision of the Federal Labour Court or with a decision of another Land Labour Court, or a superior labour court of the Land. There are other grounds which give rise to a right of appeal but this is among them. Moreover the great panel (Grossen Senat) of the Federal Labour Court has to be called upon if a panel of this court wants to dissent from a decision, which involved a question of law, given by another panel of the court. High authority is accorded to the opinions of scholars, set forth in textbooks, commentaries, pamphlets, periodicals etc. This is the reason why reference will be made here to the opinion of eminent scholars.

15. Prof. Nipperdey is of the opinion that sometimes organisations which have only self-employed persons as members are organisations within the meaning of the article. He cites as an example the Health Service Doctors Association. See Hueck-Nipperdey, Lehrbuch des Arbeitsrecht, vol. II, 5th ed., p.478, comment 24a.

agreements but it is not a must for the purpose of the article.¹⁶ It is up to the organisation to decide whether it wishes to do so or not. It is true that nowadays an organisation which as a matter of principle refuses to conclude collective agreements cannot be very influential. Public officials' unions are not permitted to conclude collective agreements,¹⁷ but the prevailing view is that they are organisations within the meaning of Art.9(3). Then there are the top organisations. By s.2 of the Collective Bargaining Agreement Statute (Tarifvertragsgesetz) top organisations are only allowed to conclude collective agreements if there is a provision to that effect in their by-laws.¹⁸ Very often there is no such provision in the by-laws for example in the by-laws of the Federation of German Trade Unions (DGB)¹⁹ there is no such provision but it is nevertheless considered an organisation within the meaning of Art.9(3).

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16. See Nikisch, Arbeitsrecht, Vol.II, 2nd ed., 1959, (hereinafter cited as Nikisch II) p.12; Bettermann-Nipperdey-Scheuner, Die Grundrechte, (Handbuch der Theorie und Praxis der Grundrechte), Dritter Band, 1. Halbband (hereinafter cited as Dietz, die Grundrechte III/1), p.443. For a different view see Huber, Wirtschaftsverwaltungsrecht, Vol.II, 2nd ed., 1954, (hereinafter cited as Huber II) p.376; Dersch-Volkmar, Kommentar zum Arbeitsgerichtsgesetz 6th ed., 1955, s.10 comment 5b hh; Hueck-Nipperdey II, p.75; Hueck-Nipperdey-Tophoven, 3rd ed., 1955, Tarifvertragsgesetz, s.2 comment 32 ff.
17. The service conditions of public officials are governed by public law. See Art.33(5) of the Basic Law.
18. The Collective Bargaining Agreement Statute was passed in 1949 and amended in 1952. Federations of trade unions and federations of employers' associations are called top organisations (Spitzenorganisationen).
19. Practically all trade unions are concentrated in the Federation of German Trade Unions (Deutscher Gewerkschaftsbund) and in the Federation of White Collar Workers (Deutsche Angestelltengewerkschaft). There are a few splinter groups.

A controversial point is whether an organisation which as a matter of principle renounces the use of economic weapons or which is prohibited to employ them by law is an organisation for the purposes of the article. Prof. Nipperdey used to be of the opinion that the use of economic weapons is an essential requirement but lately has changed his view. He maintains that nowadays trade unions have advanced to such a stage and are such a powerful factor in the social and economic life of the nation that one can presume that they are capable of pursuing their members' interests without resorting to economic weapons.²⁰ This seems a realistic view. It is generally accepted that public officials' unions are organisations within the meaning of the article despite the fact that they are not permitted to strike.²¹

2. Organisations in which both employees and employers are organised are not organisations within the meaning of Art.9(3) even if their aim is the protection and the improvement of working and economic conditions.

20. See Hueck-Nipperdey II, p.77, and comment 38 concerning s.2 of the Collective Bargaining Statute; Nikisch II, p.13; Schnorr RdA 1953 p.377, 1955, p.6; Meissinger, Reliefbild des Arbeitsrecht, 1952, (hereinafter cited as Reliefbild) p.65. Cf. Huber II, p.375.

21. A public official is not allowed to strike and participate in a slow-down because he owes a special duty of loyalty to the State. See Art.33 of the Basic Law.

3. The social partners²² must be financially and otherwise completely independent of one another.²³
4. An organisation should under no circumstances be dependent on the State. The basic right of freedom to organise first of all guarantees a status libertatis. Freedom to organise is primarily concerned with protection against the State. An organisation which is controlled by the State is not an organisation within the meaning of Art.9(3).²⁴ This does not mean, however, that the State by enacting laws, through the proper channels, is not allowed to exercise an influence on the activities of an organisation.

Opinions are divided as to whether an organisation must also be free from control by political parties and the Church.²⁵ Nipperdey is of the opinion that organisations

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22. Nowadays in the Federal Republic trade unions and employers' associations are considered partners. They are called social partners because they co-operate in many spheres, e.g. they set norms for a whole industry by collective agreements. It is true that the law looks on them as partners but nevertheless the term seems unsuitable. Their interests are not the same but rather opposing. In a full employment situation these interests are apt to clash less, employers and the representatives of labour are able to find a solution which satisfies both parties, but even then the expression seems inappropriate.
23. This harmonizes with Convention 98, Art.2 of the I.L.O. which the Federal Republic ratified in 1955. See post, p.208 footnote 25.
24. See Nikisch II, p.9; Huber II, p.369; Dietz, Die Grundrechte III/I, p.435.
25. According to Prof. Dietz religious and political neutrality is not a requirement. See Dietz, Die Grundrechte III/I, pp.434 f., Dietz-Nikisch, Kommentar zum Arbeitsgerichtsgesetz, 1954, (hereinafter cited as Dietz-Nikisch) comment 47 concerning s.10 of the Labour Court Statute; Herschel BABI 1950, p.378.

which are controlled by political parties or the Church are not organisations within the meaning of the article.²⁶ By control he means that organisations should not take instructions from a political party or the Church.²⁷ According to Nipperdey party or church attachments bear the risk that they might become an important objective of the organisations.²⁸ He believes that in their activities organisations may be led by a certain ideology or by economic and social principles; provided a decision on a democratic basis, has been taken by them and the particular political party, to whose views they adhere, has not been banned.²⁹ For example the Christian unions are organisations within the meaning of Art.9(3).

26. See Hueck-Nipperdey II, p.69 and comment 30 concerning s.2 Collective Agreement Statute; Meissinger, Reliefbild pp.23 f. and p.58. Schnorr RdA 1955, p.6.

27. See Hueck-Nipperdey II, p.296.

28. Bearing in mind the events of the thirties this view seems reasonable especially as regards employers' associations to which Art.9(3) applies as well.

29. The Communist party is banned in the Federal Republic but allowed to operate in W. Berlin. The Federation of German Trade Unions (DGB) has generally a non-committal attitude towards religious and political matters. This is desirable or even necessary since it is interested that employees belonging to various parties and confessions should join the trade unions which are affiliated to it.

5. Organisations of employees which are confined to a specific company, the so-called Werkvereine, are not organisations within the meaning of Art.9(3).³⁰ If an enterprise is a special economic branch, exception to this rule is allowed. For example, employees of the railways and postal services are organised in the Railway Union³¹ and Postal and Telegraph Workers' Union respectively, and these unions are considered organisations within the meaning of the article.

How did this requirement come about? It seems because of historical reasons. To begin with employees organised on a craft-wide basis and later on an industry-wide basis. A group of jurists led by the President of the Bavarian Labour Court has added another requirement, namely that the union must be organised along industrial lines, which is the present dominant pattern of union organisation.³² This view, however, has been generally rejected.

30. See Hueck-Nipperdey II, pp.69 f; Dietz-Nikisch, comment 43 concerning s.10 of the Labour Court Statute. Huber, however, is of the opinion that company unions if they fulfill the other requirements are organisations within the meaning of Art.9(3). See Huber II, pp.370 f.

31. The Railway Union takes in administrative, operating and maintenance employees of the railroads. Since the railroads are state-owned it might seem more appropriate to add the railroad employees to the medley jurisdiction of the Public Service, Transport and Traffic Union. For a short period railroad employees belonged to the Public Services Union but quickly fought their way out. The reason for that was the employees in that branch insisted on separate recognition of their position in society.

32. See decision of the Bavarian Labour Court, LAG Bayern, AP 50 Nr. 1 and AP 53 Nr. 150. Cf. the decision of the Federal Constitutional Court AP Nr. 1 concerning Art.9 Basic Law.

In the Works Council Statute³³ a distinction is expressly made between the collective agreement and the contract like agreement entered into between the works council and the employer.

The ban on company organisations does not mean, however, that the organisation has to be affiliated to the top organisation.

6. Membership in the organisation must be voluntary.³⁴

If the state were to compel employees to form an organisation or to join an existing organisation by enacting laws, even through the proper channels, or otherwise this would constitute a clear violation of Art.9(3).³⁵⁾³⁶

7. Ad hoc organisations as long as they fulfill the other requirements are organisations for the purposes of the article. It is not necessary for a combination of employees whose aim is to safeguard and to improve working and economic conditions to be a permanent organisation.

33. Passed by the Bundestag in 1952.

34. For compulsory unionism see post, pp.171 ff.

35. The same applies to employers' associations. Where the state forces employers to join a certain organisation it is not an organisation within the meaning of the article.

36. Prof. Nikisch is of the opinion that this would be incompatible with the social state principle which is pronounced in the Basic Law. See Nikisch II, p.6

An organisation which is being formed in order to achieve a single objective and then disbands if it has the essential characteristics which the article requires is an organisation for the purposes of the article. However, they do not seem of great significance. Nowadays only trade unions and employers' associations which are formed on a permanent basis can effectively fulfil their mission and play an important role in the economy of the nation.

8. An organisation within the meaning of Art.9(3) can be a body corporate under private law or an unincorporated society (Verein). Bodies corporate under public law are not organisations within the meaning of the article since a body corporate under public law has to be recognised by act of state (Staatsakt) and one of its features is that it is placed under the supervision of the State. A free representation of the interest of members comes to nought if the State has the power to interfere. The question arises whether the Artisan Guilds (Handwerkerinnungen) which are bodies corporate under public law, are organisations within the meaning of the article. Nipperdey is of the opinion that those guilds constitute an exception to the rule since s.49(3) of the Artisan Order confers on them collective bargaining capacity.³⁷

37. See Hueck-Nipperdey II, p.152. Prof. Dietz does not consider the Artisan Guilds organisations within the meaning of Art.9(3). He maintains that collective bargaining capacity is not self evident but is specially conferred on them. This had to be done since they are not organisations within the meaning of the article. See Dietz, Die Grundrechte III/I, p.439.

Prof. Dietz, however, is of the opinion that an organisation which is a body corporate under public law if it has the essential characteristics of an organisation and members join it voluntarily, can also be an organisation for the purposes of the article. Above all its independence from the State must be guaranteed.³⁸

According to Prof. Nikisch corporate bodies under public law may have the powers of organisations within the meaning of Art.9(3) provided they possess the essential characteristics which the article requires. The corporate body must be founded voluntarily, there must not be any compulsion to join and State supervision must be restricted to a control of its legality so that it is able to further the interests of its members quite independently. It should be noted that Nikisch considers that corporate bodies under public law, which have the essential characteristics mentioned above, have the powers of an organisation like an organisation within the meaning of Art.9(3), whilst Dietz considers them in fact organisations within the meaning of the article.³⁹

The characteristics enumerated above are exhaustive. More requirements cannot be demanded. Under certain circumstances, however, the requirements may be modified.

38. See Dietz, Die Grundrechte III/I, pp.438 f.

39. See Dietz-Nikisch comment 50 concerning s.10, and comment 52, concerning s.11 of the Labour Court Statute. See also Huber II, p.373

Sometimes the absence of certain characteristics, or some aspects of these, occurs because there is a law as a result of which an organisation is deprived of a certain characteristic or some aspects of it. For example it follows from Art.33 of the Basic Law that public officials are not allowed to strike and to conclude collective agreements, nevertheless the public officials unions are considered organisations within the meaning of Art.9(3).

Art.18 of the Basic Law provides, among other things, that whoever abuses the rights guaranteed in Art.9 in order to attack the free democratic basic order forfeits this basic right. The forfeiture and its extent are pronounced by the Federal Constitutional Court.⁴⁰ In 1952 the Federal Constitutional Court held in a decision that "free democratic basic order" means an order which prevents the occurrence of any despotism by establishing a system that limits state power by the rule of law; it gives the nation the right to determine its own polity by the will of the majority of the people. Moreover it means freedom and equality.⁴¹

It should be noted that different provisions of the Basic Law apply when a political party is unconstitutional.

40. See ss.36 ff. of the Federal Constitutional Court Statute.

41. This is not a literal translation. The present writer hopes that she managed to convey the meaning of the concept as the court had it in mind. See BverfGE 2, 1 (Leitsatz 2) 12 f.

By Art.21(2) of the Basic Law parties which by reason of their aims or the behaviour of their adherents, seek to impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality.

It has been mentioned that organisations in order to be organisations within the meaning of the article must have certain characteristics; the aim of the organisation must be the protection and the improvement of working and economic conditions. A combination of persons which has, for example, one of the following objectives: to commit crimes, to abolish the rule of law and social order, to establish communist or fascist state unions, to set aside the law of collective bargaining or law of arbitration and conciliation which is at the time in force, clearly is not an organisation within the meaning of Art.9(3) and thus the article does not afford protection.⁴²

42. This is the view of Nipperdey. See Hueck-Nipperdey II, p.95. Cf. Mangoldt-Klein comment VI (towards the end) concerning Art.9.

Nikisch is of the opinion that freedom to organise is a subdivision of freedom to associate,⁴³ and therefore the provisions of Art.9(2) of the Basic Law apply to freedom to organise as well. Art.9(2) of the Basic Law provides that associations,⁴⁴ the objects or activities of which conflict with the criminal laws or which are directed against the constitutional order or the concept of international understanding are prohibited. Associations which are prohibited under Art.9, subsection 2, can be dissolved administratively. Nikisch considers Nipperdey's solution⁴⁵ inadequate in a number of situations.

43. Freedom to associate is guaranteed in Art.9(1) of the Basic Law. Nikisch sees the protection against private forces (*Privaten Mächten*), which obviously is guaranteed in Art.9(3), as an additional guarantee which applies to freedom to organise only but otherwise considers it part and parcel of freedom to associate. He sees special significance in the facts that the two freedoms are embodied in the same article and that Art.18 Basic Law, which deals with the forfeiture of basic rights speaks about freedom to associate in general and no distinction is made between freedom to associate and freedom to organise. See Nikisch II, pp.21 f. For the same view see Wernicke, *Bonner Komm.*, comment II 3, v. Mangoldt-Klein, comment V 1. Many eminent scholars do not share this view. The latter maintain that trade unions and employers' associations have a special task namely the protection and improvement of working and economic conditions and therefore are not associations within the meaning of Art.9(1). It is known they say that freedom to organise was put in the same article because the parliamentary committee had decided not to have a special part in the Constitution dealing exclusively with social basic rights. Accordingly Art.9(2) does not apply to freedom to organise. See Hueck-Nipperdey II, pp. 54 f., Kaskel-Dersch 5th ed., p.2 79; Huber II, p.381; Schnorr, *RdA* 1955, p.4; Kastner, *Arbur* 1953, p.163. It is interesting to note that in the Convention of Human Rights (of 4th November 1950) the rights are not mentioned separately. See Art.11 of the Convention.

44. The term includes, according to him, organisations which are organisations within the meaning of Art.9(3).

45. See ante, p.93.

For example, there are organisations which have as their object the protection and improvement of working and economic conditions but which use illegal means to achieve the object and their activities are contrary to the provisions of the criminal law. He maintains that in such cases 9(2) is not superfluous. He draws attention to the fact that during the Weimar Republic organisations which were hostile towards the democratic order and aimed at its overthrow were recognised as organisations for collective bargaining purposes if they recognised the law of collective bargaining and the law of arbitration and conciliation as binding for a transitional period only.⁴⁶

46. See Nikisch, II, pp.27 f.

Chapter 6

The Right to Strike and to Boycott, and its Limitations by Law in the Federal Republic of Germany

The Basic Right to Strike

Art.9(3) of the Basic Law guarantees to the individual the right to form and to join organisations¹ for the purpose of protecting and improving working and economic conditions, but the right to engage in economic warfare, i.e. to strike to boycott and to lockout, is not guaranteed in the article.

A number of scholars are of the view that freedom to organise includes freedom to strike and that therefore it is not specially mentioned in Art.9(3).² Dietz is strongly opposed to that view.³ He maintains that freedom to strike is not guaranteed by the Constitution as can be learned from the fact that there was never any doubt that soldiers, judges and other public officials are not allowed to strike. Freedom to organise is guaranteed to all professions, thus if freedom to organise were to include freedom to strike they would be permitted to strike. Moreover, it is known that originally the Parliamentary Committee meant to insert an article in

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1. It is now generally accepted that Art.9(3) of the Basic Law also guarantees to the organisation as such the right "to exist and to function".
 2. See Meissinger, Reliefbild, pp.186 f. and also the decisions of the Bavarian Labour Court, Official Gazette (Amtsblatt) 1953, C 77, 165; 1954 C 101, 153.
 3. See Dietz, Die Grundrechte III/I, pp.462 f.

the Basic Law guaranteeing freedom to strike,⁴ and it was only later decided not to have freedom to strike guaranteed by the Basic Law because of the trade unions' insistence that only such strikes as have the support of the union should be guaranteed.⁵

If freedom to strike was also guaranteed in Art.9(3) agreements which restrict or seek to hinder this right would be null and void and measures directed to this end would be illegal. This would certainly lead to a number of very undesirable results. For example the relative peace obligation,⁶ which every collective agreement has as an implied condition, would be null and void. Thus the collective agreement would be deprived of one of its

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4. In a number of Laender freedom to strike is guaranteed by the Constitution but there it is a special basic right mentioned in a separate article. See the constitutions of Bremen, Art.51(3): Hesse Art.29(4) and Western Berlin, Art.18(3).
 5. The majority of the committee was against the trade unions enjoying a special legal position and above all it was found impossible to demarcate the official strike from the unofficial strike in the concise form required by a constitutional provision. Cf. Jahrbuch des Oeffentlichen Rechts (Year Book of Public Law) new series, vol.1 concerning Art.9 Basic Law.
 6. A relative peace obligation is an undertaking by the parties not to resort during the currency of the agreement to strike or lockout for the sake of changing the terms agreed upon, whereas an absolute peace obligation is an undertaking by the parties altogether not to resort to strike or lockout during the currency of an agreement. An absolute peace obligation must by express provision be introduced into the agreement.

essential purposes. The relative peace obligation enabled to a considerable extent modern industrial relations to arrive at their present state. Furthermore, any counter measure taken by an employer, or an employers' association, for inducing a union to end a strike would be illegal.⁷ All this seems to indicate that the makers of the Basic Law could not have possibly meant to protect the right to strike in the same way as the right to organise has been protected. It is generally accepted that the right to strike is not guaranteed by the Basic Law.⁸ Accordingly freedom to strike may be restricted by ordinary law, i.e. by statute.

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7. For instance a lockout as a counter measure to a strike. If such counter measures were prohibited it would not be an undesirable thing. Most aspects of economic warfare seem to be regulated by law and here suddenly a great deal of undesirable freedom is enjoyed. See post, p.106
8. See v. Mangoldt, AOR (Records of Public Law) Vol.75, p.287 comment 4, section 5, concerning Art.9 Basic Law; Mangoldt-Klein, comment VII concerning Art.9 Basic Law; Wernicke, Bonner Kommentar, comment II 3d; Nipperdey, a legal opinion given in connection with the newspaper strike, Heft 9 der Schriftenreihe der Bundesvereinigung der Deutschen Arbeitgeberverbände, 1953, (hereinafter cited as Nipperdey, Rechtsgutachten); Forsthoff, a legal opinion: "Die politischen Streikaktionen des DGB usw" Heft 6 der Schriftenreihe der Bundesvereinigung der Deutschen Arbeitgeberverbände, 1952, pp. 10 f; Huber II, p.393. The Federal Labour Court is of the same opinion see its decision of the 28th Jan. 1955, E.1, 291 - AP Nr.1 concerning Art.9 Basic Law. For a different opinion see the following articles in trade union periodicals - Buehrig, Mitteilungen des Wirtschaftswissenschaftlichen Instituts der Gewerkschaften (1954) pp.187, 195; Abendroth, Gewerkschaftl. Monatshefte, 1954, p.259.

Socially Inadequate Strikes

Strikers and trade unions may incur tortious liability if the strike is "socially inadequate" (sozialinadaequat).

S.823(1) of the Civil Code provides that "a person injured by a wilful or negligent act by means of which the right to freedom from violence, the right to health, and right to liberty, the right to ownership or other rights existing besides these is infringed is entitled to compensation from the wrongdoer." It is recognised that only absolute rights are protected by the section.

It is important to note that the section speaks of "other rights" (sonstiges Recht) besides the specific rights which are enumerated in the section. Various rights are considered as "other rights" within the meaning of the section such as patent right and within very narrow limits the existence of an absolute right in the continued existence of an established business.¹⁾²⁾

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1. In German the right is stated as "Das Recht auf ungestoerte Ausuebung eines eingerichteten Gewerbebetriebs." The above translation has been taken from the Manual of German Law. See E. J. Cohn, Civil Law, Manual of German Law, (published by H.M. Stationery Office), Vol.I, p.101. The translation is not a literal translation, it is extremely difficult to translate with precision this legal rule. A lock-out may be a violation of the employees' right to work which is also regarded as an "other right" within the meaning of s.823(1). "Right to work" is not meant here in the American sense but the right of an employee to keep his job.
 2. Cf. the decision of the Federal Court in civil matter 3/278, BB 1959, p.171.

As a result of a strike the existence of an established business is endangered. A business is affected in many ways if its employees are out on strike and when it lasts over a considerable time. For example in a factory production comes partially or completely to a standstill; the employer is not in a position to deliver goods or material to customers as promised and thus may lose customers. Accordingly a strike gives rise to a claim for compensation unless there is justification or the defendant did not act wilfully or negligently.³⁾⁴⁾ A strike is only justified if it is socially adequate.⁵

The question arises what is meant by, and when is a strike deemed to be socially adequate. The following rules have been laid down regarding the social adequacy of strikes.

1. Only strikes which are directed against employers or their organisations for the purpose of settling working conditions⁶ are socially adequate. Moreover the struck employer or his organisation must be capable of complying with the demands made by the Union.

3. For the meaning of wilfully or negligently see post, p.111.

4. The doctrine was first fashioned by Prof. Hueck and Prof. Nipperdey in two separate legal opinions given in connection with the Newspaper strike in 1952. The principle underlying the doctrine has been accepted by the Federal Labour Court and the Laender Labour Courts.

5. See Bulla, RdA 1962, pp.6 ff.

6. However, working conditions in a broad sense. The term in this context covers many topics.

Thus a strike which has a political objective is never socially adequate; the struck employer or his organisation is not in a position to comply with such demands.⁷ But a sympathetic strike which is in support of a socially adequate strike is considered socially adequate. It is important to note that the strike must be in support of a strike which is socially adequate. Such strikes are permissible because the secondary employer will be in most cases in a position to exercise some influence on the primary employer. It is a labour dispute, and not a dispute where objectives not directly concerning labour relations are being sought. However, sympathetic strikes are unpermissible if they are unethical from a social point of view.

2. The parties to the dispute must have collective bargaining capacity. Only where the strike has the support of a trade union, which has the capacity to conclude collective agreements and which can be a party in conciliation procedures, is it socially adequate.^{7a} On the employers' side an individual employer, several employers, an employers' association, or a federation of employers' associations can be a party to a collective

7. However, where a general strike is called because the government infringes the Constitution, or the measures which it employs are unconstitutional the strike may be lawful. In such cases the strikers have a right to strike; it is considered above the law. See Hueck-Nipperdey, Grundriss des Arbeitsrechts, 2nd ed., p.263.

7a. See the decisions of the Federal Labour Court BAG AP Nr.1 and 4 concerning Art.9 Basic Law, Economic Warfare (Arbeitskampf)

agreement whilst on the employees' side a trade union or a federation of trade unions can be a party to a collective agreement.⁸ In order to have collective bargaining capacity a trade union must be an organisation within the meaning of Art.9(3)⁹ and be willing to conclude collective agreement. There are organisations which are organisations within the meaning of Art.9(3) but the law prohibits them to conclude collective bargaining agreement;¹⁰ naturally such organisations have no collective bargaining capacity. It is important to note that a Works' Council has no collective bargaining capacity. Moreover by s.49(1) of the Works' Council Statute the works' council is not allowed to call a strike. This does not mean, however, that the members of a works' council are not allowed to participate in a strike called by a union. Strikes of individual employees or groups of employees are socially inadequate. In other words this rule outlaws all unofficial strikes.

It should be noted that it is not absolutely necessary that to begin with the strike has the support of a union. An unofficial strike becomes socially adequate once the union agrees to it and is ready to go

8. See s.2 of the Collective Bargaining Agreement Statute.

9. The same applies to employers' associations. For organisations within the meaning of Art.9(3) see ante, pp.82 ff.

10. Unions of public officials are prohibited by law to conclude collective agreements. See ante, p.84.

on with it.¹¹

3. The objective of the strike must be of such a nature that it can be a topic for collective bargaining negotiations. Thus a strike which has for an objective the conclusion of a collective agreement is socially adequate. This does not mean that the objective must be solely confined to matters relating to the contents, conclusion and termination of the contract of employments; there are other matters which can be regulated in a collective agreement. For example a strike which has for an objective the reinstatement of certain employees will be in general socially adequate. However, a strike which has as an objective the payment of wages above the collective wage is socially inadequate. It is a matter which has to be arranged between the parties to the agreement.¹² So will a strike which has for an objective a closed shop arrangement. In the Federal Republic a closed shop clause in a collective agreement is unlawful,¹³ therefore, it cannot possibly be a topic for collective bargaining negotiations.

11. See the decision of the Federal Labour Court BAG AP Nr.3 concerning Art.9 Basic Law, Economic Warfare (Arbeitskampf).

12. Moreover in such cases the trade union which calls or supports the strike can be sued for breach of the peace obligation and the so-called obligation to implement the current collective agreement. See post, p.117.

13. See post, p.175 footnote 25.

4. Strikes which undermine the fundamental principles of collective labour law are socially inadequate. For example a strike which has an objective that a collective agreement should not be extended to other undertakings¹⁴ or that wages should be regulated between each individual employee and the employer and not on a collective basis¹⁵ is of such a nature that it undermines the fundamental principles of collective labour law.

5. The strike must be the "ultima ratio". Where there is a breach of the ultima ratio rule the strike is socially inadequate. This provokes the question what is meant by the ultima ratio rule. A union is only allowed to resort to strike action¹⁶ after all attempts to reach a peaceful settlement have failed. This does not merely mean that the parties to the dispute, on their own, failed to reach a settlement but also that conciliation proceedings (Schlichtungsverfahren) before a conciliation board have proved unsuccessful. Arrangements for bringing disputes before a conciliation board are usually made by collective agreement or specific

14. For "the extension of a collective agreement" see an article in English by Th. Ramm entitled Collective Agreements in Germany in Labour Law in Europe with Special Reference to the Common Market, p.11, section IV (International and Comparative Law Quarterly, Supplementary Publication No.5, 1962).

15. See the decision of the Federal Labour Court BAG, AP Nr.2 concerning Art.9, Basic Law, Economic Warfare (Arbeitskampf).

16. The same applies to other types of economic warfare, e.g. lock-out.

conciliation agreements. The state also provides conciliation boards but it is important to note that in the Federal Republic there is no compulsory conciliation. In cases where the objective of the strike can be attained by instituting legal proceedings against the other party to the dispute the strike is unlawful. In other words the strike is not the ultima ratio. For example where a measure was employed by an employer which restricts employees in the exercise of the right to organise an action has to be lodged before the appropriate court,¹⁷ and a strike which has as an objective the undoing of this evil is unlawful.

6. A strike which is conducted in an unfair manner is socially inadequate. It is obvious where the organisers of the strike tolerate or employ violence the strike is socially inadequate. Also where false, misleading or inciting information is being given the strike becomes unfair and thus socially inadequate.¹⁸ However, in judging the unfairness of an activity a certain latitude is allowed and the strike is only socially inadequate if it goes too far. Where a great deal of damage is caused by the strike which stands in no proportion to the objective which the strikers or organisers seek to achieve the strike is socially inadequate.

17. It should be noted that in such cases it is the individual employee who has a cause of action. See post, pp.167 ff.

18. It is similar to what in Britain comes under the heading of unlawful means, but it is not identical with it. For the law in Britain see ante, p.17.

Strikes in public utility undertakings such as hospitals or transport services, if no emergency service has been provided, are considered socially inadequate.

7. Finally, it is important to note that where the employer locks out employees and the lock-out is socially inadequate, a strike called as a counter measure is socially adequate in spite of the fact that the objective of the strike is not a topic for collective bargaining negotiations.

Reinstatement of Strikers

Where the strike is unlawful the employer has the right to dismiss summarily the employees who participate in the strike.¹⁹

Employees who participate in a lawful strike cannot be dismissed summarily or otherwise for breach of contract and they have to be reinstated. However, the employer has a right to lock-out the strikers and those who were willing to work as well regardless of whether the strike is lawful or not.²⁰ The reinstatement of employees who lost their jobs through a lock-out is at the discretion of the employer unless there is a clause in the collective agreement in which arrangements have been made for such eventualities. Thus unions have to be careful to ensure

19. For compensation see post, pp.111 ff.

20. See decisions of the Federal Labour Court BAG AP Nr.1, 6 and 9 concerning Art.9 Basic Law, Economic Warfare (Arbeitskampf).

that an adequate clause is inserted in the agreement.
In a country where the right to strike has been so restricted it seems harsh and inequitable that strikers should not have a right of reinstatement where the strike is lawful. Nowadays there are plenty of jobs available and the harshness of the rule might not be felt but what about employees who do not like to change jobs?

Picketing

In the Federal Republic picketing might take place in connection with a strike but independent picketing is unknown.

Picketing is lawful as long as the pickets peacefully persuade nonstriking employees or replacements to abstain from working. But where pickets by unlawful threats of violence prevent nonstriking employees or replacements from entering the picketed plant and such acts are tolerated or orders given to this effect by the strike organisers, the whole strike, and this includes the picketing, becomes socially inadequate. However, if these acts are committed without the consent of the strike organisers the lawfulness of the strike and the picketing is unaffected. By ss.823(1) and (2) of the Civil Code the nonstriking employees or replacements have a cause of action against the pickets who actually have committed the unlawful acts.

It is unlawful for pickets to prevent the delivery of goods and raw materials to and from the place which is picketed. In such cases the pickets can be sued by the employer for the resultant damage.¹ The same applies to the union if such acts are tolerated or orders to that effect are given by it.

1. Cf. decision of the Land Labour Court in Hannover, BB 1956, p.924; Hueck-Nipperdey II, p.654.

Boycott

Nowadays boycotts occur very infrequently and if they take place it is in support of a strike. As regards the permissibility of boycotts the Supreme Labour Court during the Weimar Republic in a judgment delivered in 1928 laid down certain rules which still find application. According to that judgment the boycott in general is not unlawful provided there is a labour dispute.¹ The court said that a boycott is unlawful in any of the following instances : (i) where the objective and the means employed are contra bonos mores² or contrary to a provision of law, (ii) where the boycott is not the ultima ratio.³

1. The expression "labour dispute" is meant here in the literal sense.

2. S.826 of the Civil Code provides that "an unlawful act done wilfully by means of which damage is done to another in a manner contra bonos mores gives rise to a claim for compensation.

The damage must have been caused wilfully (*vorsatzlich*). A person acts wilfully if he is conscious of the illegality of his conduct and its damaging effect. It is not necessary, however, that the defendant was conscious of having acted immorally, nor is knowledge of the kind or the amount of the probable damage required.

The expression contra bonos mores (*gegen die guten Sitten*) is not defined in the Civil Code. The Reich Court and the Reich Labour Court laid down certain rules when an act or omission is considered contra bonos mores in labour disputes. See RAG ARS 1, p.100; RAG ARS 2, p.217; RAG ARS 5, p.253; RAG ARS 7, p.404; RAG ARS 10, p.100.

It is not easy to succeed in an action under s.826 and the plaintiff will find it easier to establish the requirements under s.823(1). For s.823(1) see *supra*. See also an article by Schnorr in RdA 1955, p.223. The rules of social adequacy might be more suitable where the issue is whether a strike or a boycott is lawful or not but these rules certainly impose more restrictions on the right to strike or to boycott than does s.826 of the Civil Code.

3. For the ultima ratio rule see ante, pp.104 f.

The employer or the secondary employer has a cause of action under s. 823(1) of the Civil Code if the right to the continued existence of its business has been violated.⁴ Where the boycott is socially adequate no action lies.⁵

4. For further details about the right see ante, pp.99 f.

5. The rules of social adequacy apply to the right to boycott as well. The rules are discussed on pp.100 ff.

Compensation

By s.823(1) of the Civil Code a person who, wilfully or negligently, injures unlawfully the life, body, health, freedom, property or any other right of another person is bound to compensate¹ him for any damage arising therefrom. One of "the other rights" within the meaning of the section is the right to the continued existence of an established business.² Where there is a strike or a boycott there may be a violation of this right. The plaintiff must prove that the defendant has acted wilfully or negligently, but this task is greatly facilitated by the general rules of probability and of prima facie evidence. Wilful (Vorsatz) means that the defendant was conscious of the illegality of his conduct and its damaging effect whilst negligence (Fahrlaessigkeit) means that he should have been conscious of it. Another requirement is that the injury must have been caused unlawfully. This means that the injury must not have been rendered lawful by one of the various grounds which may justify the defendant's act. If the defendant can prove that the objective of the strike or boycott, or act or omission which were done in connection with it, are socially

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1. The defendant has to compensate the plaintiff for the whole damage which was caused by his tortious act. German law does not know exemplary damages. This is the reason why the term "compensation" and not "damages" is used here.
 2. For further details see ante, pp.99 f.

adequate no action lies.³ Thus when employees go on strike or refuse to handle goods it is almost taken for granted that their acts and the acts of the organisers of the strike or boycott amount to negligence and it is up to the union and the employees who are involved to prove that the strike or boycott was socially adequate.

The question arises whether the union is liable for the acts of the organisers of the strike or boycott and for the acts of individual employees who participate in them.

By s.31 of the Civil Code a body corporate under private law is liable for torts committed by its board, a member of the board, or other statutory representatives, provided that the act or the omission was done in the exercise of its or his official duties. Most unions are, however, unincorporated societies. It is now generally accepted that s.31 finds application to unincorporated societies as well.⁴

It is sometimes difficult to determine who is a special representative within the meaning of s.30 of the Civil Code. The prevailing view is that a special representative is a person who has been empowered, either

3. The rules governing "social adequacy" are discussed in detail on pp.100 ff.

4. See Nikisch, II, p.188; Denecke BB 1959, p.637 Forsthoff-Hueck, Rechtsgutachten (legal opinion), Heft 6 der Schriftenreihe der Bundesvereinigung der Deutschen Arbeitgeberverbände, 1952, p.48, and the decision of the Land Labour Court in Frankfurt/Main, Rda 1950, p.427.

by the board or under its by-laws (Satzung), to engage in certain transactions, provided the manner of performance of such transactions is at the representative's own discretion. Not only an incorporated society but also an unincorporated society is liable for torts committed by a special representative. The society is liable for his act as if it was its own act and cannot escape liability by proving certain facts as is possible under s.831 of the Civil Code.⁵

For other persons the union may be liable under s.831. S.831 provides that "a person who employs another on any kind of work must compensate any third party for damage unlawfully inflicted upon him by his employee in the course of his employment, unless he can prove : that he applied the degree of diligence usual under the circumstances in the selection of the employee or that the damage would have arisen notwithstanding the application of the proper degree of diligence on his part." Thus under this section the union may escape liability.

The union is, therefore, responsible for the torts of the organisers of a strike or boycott if they are special representatives within the meaning of s.30. If they are not special representatives the union is responsible for them under s.831.

Under s.831 the union may be responsible for a person who has been asked by its board or other statutory representative to perform a single task, for example, for pickets who have been asked to distribute literature.

5. For s.831 see below.

Moreover, besides the union, individual persons who participate in a strike or a boycott which is socially inadequate incur liability provided they have acted wilfully or negligently.

There may also be a cause of action under s.823(2) of the Civil Code. This section provides that a person who violates a statutory provision intended for the protection of others, is liable to pay compensation for any damage arising from the violation. Among the laws for the protection of others are many sections of the Penal Code but there are also other statutory provisions which are considered laws for the protection of others. The plaintiff is only entitled to compensation if the defendant acted wilfully or negligently⁶ even in cases where the specific statutory provision (intended for the protection of others) can be violated without this requirement.

Any of the following sections of the Penal Code is sometimes contravened in connection with a strike or boycott :

- | | |
|------------|---|
| SS.185 ff. | defamation and trespass to the person
(Beleidigung); |
| s.123 | trespass, breaking into a dwelling house
without intent to commit a felony
(Hausfriedensbruch); |
| s.240 | intimidation, the offence is only committed
if the threat is actually carried out
(Noetigung); |
| s.223 ff. | battery, causing grievous bodily harm
(Koerperverletzung); |
| s.125 | breach of the peace (Landfriedensbruch); |
| s.303 | injury to property (Sachbeschaedigung). |

6. For the meaning of a wilful or negligent act
see ante, p.111.

Prohibitory Action

If during a strike or a boycott a statutory provision for the protection of others has been violated and there is a danger that the unlawful act will be repeated a preventive prohibitory action (vorbeugende Unterlassungsklage) against the wrongdoers may be brought by the injured person. It is not a requirement that the defendant has acted wilfully or negligently. It should be noted that a preventive prohibitory action can be brought even if an action for compensation does not lie.⁷ It is not necessary, in an action of this kind, that actual damage has been caused by the violation; it suffices that damage is imminent if there is a continuance of the unlawful act.⁸ On application a court may enjoin the unlawful activity.⁹

Where the strike or boycott is socially inadequate a prohibitory action (Unterlassungsklage) lies and also here the injured person can petition the court for injunctive relief. Also in this type of action there is no need to prove that the defendant acted wilfully or negligently.¹⁰

7. If the defendant acted wilfully or negligently an action for compensation can be brought but meanwhile the plaintiff can avail himself of this remedy.

8. Cf. Palandt, Kommentar zum Buergerlichen Gesetzbuch, 22nd ed., 1963 (hereinafter cited as Palandt) Introduction to s.823 of the Civil Code, comment 8 b.

9. The Labour Court which has jurisdiction to deal with the main action has also jurisdiction to issue an injunction (Einstweilige Verfuegung). See s.937 of the Code of Civil Procedure (ZPO). However, in urgent cases the Municipal Court (Amtsgericht) can be petitioned to enjoin the activity.

10. Cf. Palandt, Introduction to s.823, comment 8 a.

Contractual Liability

Employees who participate in a lawful strike without giving proper notice are not guilty of breach of contract.¹ Thus their employer cannot sue them for compensation. However, the employer does not have to pay wages.

Where the strike is unlawful an employee who participates in the strike is guilty of a breach of duty arising under his contract of employment. If he acts wilfully or negligently the employer can sue for specific performance. But such a judgment cannot be executed since an employee cannot be forced to perform services. However, the employer in anticipation of such eventuality, namely, that the employee might not comply with the judgment, can sue for compensation.

An employee who participates in a strike which is contrary to a statutory provision² acts contrary to contract. If he knew about the illegality of the strike or should have known about it he has to compensate his employer for the damage caused by his stoppage of work.³ Where the employer dismisses an employee summarily because of nonperformance he can still be sued by his employer for compensation under s.628(2) of the Civil Code.

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1. See the decision of the Federal Labour Court BAG AP No.4, Economic Warfare (Arbeitskampf).
 2. For example where a works council calls a strike the strike is contrary to a statutory provision. See s.49 of the Works Council Statute.
 3. See ss.276 and 280 of the Civil Code and the decision of the Federal Labour Court of 17th Dec., 1958. See also an article by Hampel, RdA 1958, p.449.

The strikers are jointly and severally liable (Gesamtschuldner)⁴ for the whole amount of the damage caused by their collective action.⁵

As an implied condition every collective agreement has a relative peace obligation and an obligation imposed on the contracting parties to see to it that the agreement is implemented. A relative peace obligation is an undertaking by the parties not to resort during the currency of the agreement to strike or lockout for the sake of changing the terms agreed upon. Thus where there is a current collective agreement and the trade union calls a strike it commits a breach of contract. Where there is such breach the employer is entitled to compensation from the union.⁶

It is important to note where an act or omission gives rise to an action in tort and for breach of contract it is up to the plaintiff to decide which claim he wishes to raise.⁷

4. This is the legal position despite the fact that they have not a collective contract within the meaning of s.427 of the Civil Code.

5. The right accrues from ss.830 and 840 of the Civil Code because they acted jointly.

6. Where the employer is a party to the agreement it is clear that he has a right to sue for breach of contract. The question arises what is the position where the agreement was concluded between an employers' association and a union. The prevailing view is that rights derived from the collective agreement rest not only in the association but also in its individual members who, in the event of a violation of the peace obligation are entitled to claim compensation for breach of contract.

7. Cf. RG 88/433, 90/408.

Comparisons and Conclusions
Relating to Part I

In the United States and the Federal Republic of Germany freedom to organise is guaranteed and protected by the State. In the Federal Republic the interesting observation can be made that employer practices to discourage union membership are outlawed but the unions are being deprived of the right to deal with these problems on their own. After 1959 a somewhat similar tendency, of course to a much lesser extent, can be noticed in the United States. On the face of it this might seem desirable but a closer look may bring about a change of mind.

It is a commonplace that a statute or a constitutional provision is incapable of embracing all situations. Thus in practice in quite a number of instances the state does not protect because the specific situation was not envisaged and the union cannot deal with it by resorting to economic weapons, as the law prevents it from doing so.

Since 1959 organisational picketing has been outlawed in the United States. Organisational picketing is directed at employees and seeks to persuade them to join a union. Where a union has been certified by the Board or where the employer has entered into collective bargaining negotiations with a union there may be a justification for outlawing organisational picketing because it is not any more a question of joining any union but a certain union. But by outlawing all organisational picketing the right to organise was restricted.

There are still many firms where the employer is not interested that his employees should join any union. The employer has a precise knowledge of the provisions of the NLRA regarding employer unfair labour practices and therefore does not indulge in any forbidden practices. But the employees know his attitude towards unions and are eager to keep their jobs. Thus in a Board election they vote that they do not want any union. In such cases the union by picketing the plant could exert some pressure. But since an election has been held they are not allowed to do so, and the picketing will be enjoined. The union is deprived of a means to effect unionisation. In the United States the question of unionisation is of great importance as a union can never succeed in an election if it has not got sufficient members or adherents. If the majority of the employees of the bargaining unit vote against union representation no union is certified. This is an example where the law has not envisaged all situations.

In the Federal Republic of Germany a strike which has an objective that the employer should conclude a collective agreement with a union is not unlawful.¹ Thus also picketing which is conducted in connection with it is not unlawful. However, a strike for the purpose of effecting unionisation is unlawful. It is not a matter which can be regulated by a collective agreement; this would be a

1. This can be allowed, as union rivalry has disappeared in the Federal Republic. It is a way of making an employer enter into collective bargaining negotiations. There is no law forcing him to do so.

violation of the negative side of freedom to organise.²

In the Federal Republic strikes for the purpose of protesting against measures employed by an employer which restrict or seek to hinder employees in their right to organise are unlawful. Such strikes would involve a breach of the ultima ratio rule which lays down that where legal redress is obtainable strike action is prohibited.

In the United States a strike against an employer unfair labour practice is permissible. Moreover, employees participating in such strikes are entitled to reinstatement with back pay. Even a strike in violation of a no-strike clause in a collective agreement where it is provoked by an employer unfair labour practice is lawful and the provisions of the NLRA regarding 60-day notice and cooling-off period do not apply.

Every year quite a number of unfair labour practice strikes take place in the United States, and one wonders why they occur. Is the machinery of the Board so slow and inefficient that there is a need for such strikes and/or picketing? However, it was a wise step of Congress not to outlaw such strikes and not to deprive labour of its right to protest against prohibited conduct of this kind. The policy of the Board and the courts to let strikes of this nature enjoy a privileged position lends support to the provisions of the NLRA proscribing employer practices to discourage union membership.

2. For "the negative side of freedom to organise" see post, pp.171 ff.

In February 1965 a Royal Commission was appointed in Great Britain. The terms of reference for the commission are : "To consider relations between management and employees and the role of trade unions and employers' associations in promoting the interests of their members and in accelerating the social and economic advance of the nation with particular reference to the law affecting the activities of these bodies "

Among the many problems with which the commission will have to deal will be presumably the protection of freedom to organise and to refrain from organising of individual employees. It is anticipated that legislation in this respect might be proposed. The present writer ventures to say that the American example should not be overlooked. Experience shows that administrative bodies and law courts, however well they are organised, have not got the ability to deal with all cases at once, and it is natural that the parties immediately concerned feel an urge to react. The law should not prevent them from doing so. If the machinery dealing with these problems is efficient strikes and picketing for the purpose of protesting against employer practices to discourage union membership will be very infrequent; but the law should not intervene here. Freedom to organise involves more than being protected by law.

PART II

PROTECTION OF FREEDOM TO ORGANISE

Chapter 7

Protection of Freedom to Organise in the United States

I: Protection against Interference, Restraint or Coercion

General Observations

S.8(a)(1) of the NLRA is a broad general provision which gives to employees and unions legal protection against employer anti-union tactics. This section provides that it shall be an unfair labour practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in s.7 of the Act.¹

Concrete acts which fall within the scope of the section are espionage, blacklisting, promises to reward employees who reject unionization, runaway shops, and in general all activities designed to obstruct or interfere with free organisational activities.

It has been held by the Supreme Court that a violation of section (2), (3), (4) or (5) of s.8(a) is also a violation of s.8(a)(1).²⁾³⁾ It should be noted that s.8(a)(1) may also be violated alone. In the first years after the passage of the NLRA charges under s.8(a)(1)

1. For the provisions of s.7 see ante, p.33.

2. See NLRB v. Express Publishing Co., 312 US 426 (1941).

3. S.8(a)(2) outlaws company unions; see post III, pp. 160 ff. S.8(a)(3) outlaws discriminatory treatment of employees for the purpose of encouraging or discouraging union membership; see post II, pp. 142 ff.

were rarely made. Only in later years when employers began carefully to avoid specific acts mentioned in the other sections the NLRB began to revert to it.

Espionage

Prior to the reforming legislation of the 1930s it was quite common for employers to engage labour spies, who were often hired from detective agencies. These spies infiltrated labour organisations and reported on the agitators who were then discharged and blacklisted. It is obvious that by enacting s.8(a)(1) Congress meant to outlaw these practices. But apparently if an employee does the spying no violation takes place. In Florida Builders, Inc.⁴ the Board held that if an employer merely instructs a foreman to report any rumour he hears concerning union organisation there is no violation of s.8(a)(1).

Blacklists

In NLRB v. Waumbee Mills, Inc.⁵ the court through Magruder J. said : " A long experience had shown that one of the most provocative and effective means by which employers sought to impede the organisation of employees was the blacklisting of union men, thereby denying them opportunities for employment."

4. 111 NLRB 786 (1955).

5. 114 F2d 226, 232 (CA1, 1940).

It was held in Alaska Salmon Industry Inc. (1957)⁶ to be unlawful under the NLRA to refuse to select an employee for employment because he had filed a charge with the NLRB.⁷ In this case an employers' association operated a hiring hall. The association refused to select an employee for employment by any of its members because he had filed a charge with the NLRB.

Interrogation of Employees

Prior to 1954 the Board held for many years that the interrogation of employees as to their union activities is unlawful per se. This rule was, however, modified in Blue Flash Express, Inc.⁸ In this case the union wrote a letter to the company informing them that the union represented a majority of the company's employees and that it desired to enter into collective bargaining negotiations. Before replying, the general manager of the company interrogated employees as to whether they had joined the union - stating that it was immaterial to him whether or not employees were union members. Each employee denied to the general manager that he had signed any union card, although a majority had done so.

6. 119 NLRB 612.

7. This is expressly forbidden by s.8(a)(4) of the NLRA. In many states statutes specially outlaw such practices. In some states the prohibition is contained in the state labour relations act and in others there is a special statute which deals with such practices.

8. 109 NLRB 591 (1954). There the union would have been better advised to ask the Board for a certification. A union can ask for a certification by the Board if it wishes to be recognised by the employer. See ante, p.63.

It was held by the Board that the interrogation of employees as to their union activities is not unlawful per se, and that the test is whether, under all the circumstances, such interrogation tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act.

It seems a pity that the rule was modified. This case clearly indicates that the interrogation of employees as to their union activities should be forbidden. The employees must have known that their general manager was not very eager that his employees should be union members in spite of the soft and carefully chosen words uttered by him.

In Mid-South Manufacturing Co.⁹ where the interrogation was accompanied by threats of reprisals and other unfair practices the Board held that the employer had violated s.8(a)(1).

In S. H. Kress and Co. (1963)¹⁰ the Board held unlawful an employer's systematic interrogation when the employer was informed by several employees that there was doubt as to an adequate showing of union interest in support of a representation petition. The Blue Flash case was held not conflicting with this case since it related to systematic interrogation on the question of a union's claimed majority status asserted in support of its bargain demand. However, enforcement of the

9. 102 NLRB 230 (1958).

10. 137 NLRB 1244 (1963).

Board's order was denied on the basis that no restraint upon or interference with employees was shown.¹¹ The court of appeals stated : "The question is whether the purpose would appear to the employees to constitute reasonable grounds for an interrogation. If so, the fact of interrogation in and of itself would carry no sinister implication to the employees."¹²

Organisational Activities on Employer's Premises

The question arises, if a union begins distributing literature and soliciting members in a plant, what restrictions may the employer lawfully place on the solicitation and distribution? In those cases a great deal depends on "who", "where" and "when". Who is doing the soliciting or distribution, employees or non-employees; where does the solicitation or distribution take place, on or off company property, and when does the soliciting or distribution take place, within or off working time.

In the leading case NLRB v. Babcock & Wilcox Co.¹³ the law with respect to the validity of employer rules against solicitation and distribution of union literature by non-employee organisers was enunciated. In this case, the employer refused to permit distribution of union literature by non-employee union organisers on company-owned

11. 317 F2d 225 (CA9, 1963).

12. See also Bon-R Reproductions, Inc. v. NLRB 309 F2d 898 (CA2, 1962).

13. 351 US 105 (1956).

parking lots. The NLRB found that it was unreasonably difficult for the union organisers to reach the employees off company property and held that in refusing the unions access to parking lots, the employer had unreasonably impeded its employees' right to self-organisation in violation of s.8(a)(1) of the NLRA. The Supreme Court per Justice Reed held that the Board failed to make a distinction between rules of law applicable to employees and those applicable to non-employees. The plants were close to small well-settled communities where a large percentage of the employees lived. The usual methods of importing information were available; the various instruments of publicity were at hand. The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organisation when other means are readily available.

But what is the position if the solicitation and distribution of literature on company property is done by the employer's own employees? It was held in Peyton Packing Co.¹⁴ that the promulgation and enforcement of the no solicitation rule during working hours does not constitute a violation of s.8(a)(1) of the Act. Here one member of the Board said working time is for work.

14. 49 NLRB 823, 843 (1943). This point was discussed in United Steelworkers of America v. NLRB, see post, pp.136 f.

In Republic Aviation Corp. v. NLRB¹⁵ it was held that the promulgation and enforcement of such rules during non-working hours was violative of s.8(a)(1) of the Act, unless the employer can show some special circumstances which make such rules necessary to maintain production or discipline. Special circumstances were held to exist in department stores. In Marshall Field Co. v. NLRB¹⁶ it was held that retail stores may generally ban solicitation in public areas of the store even during employees' off-hours in order to avoid confusion for customers.¹⁷

The Board in Stoddard-Quirk Mfg. Co.¹⁸ distinguished between the principles governing employer rules against solicitation and distribution of literature.¹⁹ After a thorough review of the relevant cases the majority of the Board concluded that to effectuate organisational rights through the medium of oral solicitation, the right of employees to solicit on plant premises must be afforded subject only to the restriction that it be in non-working time. However, because distribution of literature is a

15. 324 US 793 (1945).

16. 200 F2d 375 (CA7, 1952).

17. See May Department Stores Co. 316 F2d 797 (CA6, 1963), post, pp.137 f.

18. 138 NLRB 615 (1962).

19. For cases where the law as regards oral solicitation was laid down see post, pp.131 ff.

different technique and poses different problems both from the point of view of employees and from the point of view of management, they believe organisational rights in that regard require only that employees have access to non-working areas of the plant premises. Members Fanning and Brown were for a 'no littering' rather than a 'no distribution' prohibition. They said the right of employees to distribute literature in non-working time on the plant premises must be afforded subject to the restriction that no littering takes place. The dissenting decision seems a very reasonable and fair solution. The distribution of literature is not entirely banned and the employer's right to have a clean plant is taken into consideration.

The question arises how should the handing out and signing up of union authorisation and membership cards in work areas during non-working time be classified? The Board in Gale Products²⁰ considered whether a clause in a collective agreement prohibiting distribution and solicitation activities by employees infringed upon statutory rights guaranteed by s.7 of the Act. In this case several employees formed an independent union and attempted to distribute membership application cards. The Board held that the clause in the agreement was invalid insofar as it prohibited any distribution of

20. 142 NLRB 136 (1963).

literature during non-working hours in non-working areas and any solicitation during non-working time on behalf of a union other than the contracting union. The view of the majority of the Board was that the unlimited contractual prohibition would unduly hamper employees in exercising their basic rights under the Act. The May Department Store case was distinguished.²¹

The court held where an employer applies his rules in a manner which discriminates against one union as compared with another union an unfair labour practice has been committed.²²

The Board has had to deal over and over again with the question whether the employer has the right to prohibit the wearing of union buttons and other insignia by employees on his premises. It was held that the right of employees to wear such buttons and insignia comes within the scope of union organisational activities, and only in exceptional cases can be prohibited.²³ For instance, the employer may properly prohibit the wearing of union buttons which read "Don't be a scab".²⁴

21. See post, pp.137 f.

22. See NLRB v. Stowe Spinning Co. 336 US 226 (1949) where this principle was enunciated.

23. See Republic Aviation Co. v. NLRB, supra at note 15.

24. See Kimble Glass Co. v. NLRB, 230 F2d 484 (CA6, 1956) and Caterpillar Tractor Co. v. NLRB 230 F2d 357 (CA7, 1956). Cf. Boeing Airplane Co. v. NLRB 217 F2d 369 (CA9, 1954).

A scab is a workman who refuses to join a union or strike or takes a striker's place.

The Free Speech Issue

The First Amendment of the U.S. Constitution provides that Congress shall pass no law abridging the right of free speech. By s.8(a)(1) employers may not interfere with, restrain or coerce employees in the exercise of the rights guaranteed in s.7 of the Act. Therefore the question of free speech exercised by the employer must be considered in the light of the rights guaranteed to employees by the NLRA. In the 1940's employers were dissatisfied with the rules laid down by the courts and the Board as regards free speech. In 1947 a new section, namely s.8(c) was inserted in the NLRA by the Taft-Hartley amendments. S.8(c) provides that the expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.²⁵

The court of appeals said in NLRB v. Kropp Forge Co.²⁶ "The language of s.8(c) seems to us no more than a restatement of the principles embodied in the First Amendment

25. The literature on this subject is substantial. See Koretz, Employer Interference with Union Organisation Versus Employer Free Speech, 29 Geo.Wash. L.Rev. (1960), 399; Unions in Relation to Elections Before the National Labour Relations Board 12 U.Fla.L.Rev.(1959), 423; Aaron, Employer Free Speech: The Search for a Policy in Public Policy and Collective Bargaining (1962) pp.28 ff.

26. 178 Fed 822 (CA7, 1949) certiorari denied 340 US 810 (1950).

.... in determining whether such statements and expressions constitute, or are evidence of unfair labor practice, they must be considered in connection with the positions of the parties, with the background and circumstances under which they are made, and with the general conduct of the parties."²⁷

It was held in decisions by the Board that though other unfair labour practices are found, an anti-union statement will not be found to be violative of the Act, unless it contains a threat of reprisal or promise of benefit as required by s.8(c).²⁸

It is sometimes difficult to distinguish between a threat of reprisal and a prediction of dire economic consequences which would, in the employer's opinion follow from unionisation. In Chicopee Mfg. Co.²⁹ the Board enunciated the principle that a prophecy that unionisation might ultimately lead to loss of employment is not coercive where there is no threat that the employer will use its economic power to make its prophecy come true. In Lux Clock Manufacturing Co. Inc.³⁰ the employer made a speech to his employees at the plant persuading them not to vote for the union. After the speech an employee asked, "Mr. Lux, is it true that if the union wins the election,

27. Nevertheless after the enactment of s.8(c) many letters and speeches have been held privileged which would have been regarded as unfair under earlier decisions.

28. See Southwester Co., 155 NLRB 805 (1955) and B.M.C. Manufacturing Co., 113 NLRB 823 (1955).

29. 107 NLRB 106 (1953).

30. 113 NLRB 1194 (1955). For "runaway shop" see post, pp.140 f.

the factory will shut down." The employer's reply was, "Unfortunately if I made a proper answer to that thing - no I am sorry, I cannot make any comments on that particular question - it is against the law." The Board held that his speech was privileged. It is quite common that employers before making an anti-union speech seek legal advice and are instructed by their lawyer how to get the point across without breaking the law. This shows how dangerous a provision like s.8(c) can be.

The Board has indicated that an employer may freely predict what third parties may do if the union wins an election. In Southwester Co.³¹ the employer made certain remarks to the effect that alien employees if they joined the Communist Union might be deported by the Immigration Department. He further said that if the union won the election they would control the hiring and would replace the present employees with persons having greater union seniority and with allegedly undesirable persons. The Board held that the employer merely opined concerning the possible actions of third parties, completely detached from him, should the employees continue their adherence to the Union. The statements contained no threats that he would take any steps to induce the happening of the predicted events. Accordingly they found that the above statements were privileged under s.8(c) and therefore did not constitute violations of s.8(a)(1).

31. 111 NLRB 805 (1955).

Before the enactment of s.8(c) of the Act it was held that requiring employees to listen to anti-union speeches in company time was an unfair labour practice, despite the fact that the same statements if made under different circumstances would not have been considered coercive. But after the Taft-Hartley amendments the Board has reversed its position on this point.³² In the Bonwit Teller case the doctrine³³ reappeared but in a modified form. Finally a change in Board membership brought about the decision in Livingston Shirt Corporation.³⁴

In the Livingston Shirt case the employer had promulgated to its employees the rule that activities for or against any union must not be carried on during working hours. Three days before a scheduled Board election the employer, during working hours, spoke to the assembled employees. The speech was anti-union but noncoercive. One hour after the speech some employees requested the employer that he should grant to the union an opportunity to reply to the speech under similar circumstances.

32. See Compulsory Audience no Longer an Unfair Labor Practice Per Se 48 Colum.L.Rev. 1098 (1948).

33. The doctrine is commonly referred to as "the captive audience doctrine". The employees constituted a "captive audience" as they were forced to listen to these speeches. For the Bonwit Teller case see below footnote 35.

34. 107 NLRB 400 (1953). After the Republican Administration took office in 1953 the chairman and one member of the NLRB were replaced by appointees of the new President. In less than six months the reconstituted Board repudiated the Bonwit Teller case. See also Peerless Plywood Co. below footnote 36.

The answer does not appear on the record but it can be assumed that the request was denied. The election resulted in a defeat for the union. The Board held that the Bonwit Teller doctrine³⁵ was contrary to the statute and congressional purpose. The Board pointed out that the Peerless Plywood rule³⁶ is much more limited and, in their view, a more reasonable and practicable qualification on absolute freedom of speech than Bonwit Teller. In this case, however, they considered a departure from the Peerless Plywood rule as both a minor

35. Bonwit Teller Inc., 96 NLRB 608 (1951) 197 F2d 640 (CA2, 1952) cert. denied 945 US 905 1953. The case dealt with department store situations. In this case the court of appeals reasoned as follows: "The Board, however, has allowed retail department stores the privilege of prohibiting all solicitation within selling areas of the store during both working and non-working hours. Bonwit Teller chose to avail itself of that privilege and, having done so, was in our opinion required to abstain from campaigning against the Union on the same premises to which the Union was denied access, if it should be otherwise, the practical advantage to the employer who was opposed to unionisation would contribute a serious interference with the rights of his employees to organise." Cf. May Department Stores, post, pp.137 f.

36. Peerless Plywood Co., 107 NLRB 427 (1953). This was a representation case in which the Board prescribed, as an election rule, a prohibition against employer speeches to employees on his premises during working hours within 24 hours prior to a scheduled Board election. The Board set the election aside because the employer had assembled its employees on company property less than 24 hours before the election. In this case the Board laid down the following rule: " employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." The Board held that the rule is inapplicable to other legitimate campaign media, e.g. distribution of literature, posting of signs in the plant.

and a necessary one. They quoted Justice Holmes who had said that the life of the law has not been logic but experience. They ruled that in the absence of either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad but not unlawful because of the character of the business) an employer does not commit an unfair labour practice if he makes a pre-election speech on company time and premises to his employees and denies the union's request for an opportunity to reply. Member of the Board Murdock dissented from that decision in part.³⁷ In NLRB v. United Steelworkers³⁸ the issue before the Supreme Court was "whether an employer commits an unfair labour practice if during a pre-election period it enforces an otherwise valid rule against employee distribution of literature in the plant, while, during the same period, itself distributing non-coercive anti-union literature within the plant in a context of other unfair labour practices, committed prior to the election period and thereafter." The Avondale Mills case³⁹ involved similar facts.

37. Generally, in manufacturing industries, a no-solicitation rule which interferes with the right of employees to solicit on non-working time violates s.8(a)(1) of the Act. However, department stores have long been exempted from the application of the rule because the nature of the business is such that solicitation, even on non-working time, in selling areas, would unduly interfere with the retail store operations. See ante, p. 128.

38. 357 US 357 (1958) generally cited as the NuTone case.

39. 115 NLRB 840 (1956), 242 F2d 669 (CA5 1957).

The Supreme Court disposed of the two cases in a single opinion. The Court per Mr. Justice Frankfurter held; " No attempt was made in either of those cases to make a showing that the no-solicitation rule truly diminished the ability of the labor organisations involved to carry their message to the employees. Of course the rules had the effect of closing off one channel of communication; but the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it."⁴⁰

In Time-O-Matic, Inc. v. NLRB⁴¹ the employer issued a no-distribution rule, applicable only to union literature. The court of appeals rejected the argument of the employers that under the NuTone case, the Board must prove that alternative channels of communication were not reasonably available to the union.

In May Department Stores⁴² the facts were briefly as follows: The company owns and operates two department stores. During the years 1959 and 1960 the Union campaigned to organise the employees of the company. During this time the company had in effect enforced a

40. Warren C. J. concurred and Justices Black and Douglas dissented.

41. 264 F2d 96 (CA7, 1959).

42. 316 F2d 797 (CA6, 1963).

broad no-solicitation rule which prohibited inter alia union solicitation in the selling areas of the store during the employees' working and non-working time. Just prior to the election the company made non-coercive anti-union speeches to massed assemblies of employees on company property and thereafter denied the Union's request for equal opportunity and time to address the same employees. The court of appeals held that under the principles established in the NuTone case, which they deem dispositive of the issue in this case, the enforcement of a valid no-solicitation rule by an employer who is at the same time engaging in anti-union solicitation may not constitute an unfair labour practice in the absence of substantial evidence that, when all alternative reasonably available channels of communication are considered, the ability of the Union to carry its message to the employees has been truly diminished.

Economic Coercion and Inducement

Generally economic coercion coincides with discrimination; because of that it plays only a minor role as a separate issue. Employer statements and publications, containing threats of economic reprisals and promise of benefit, in order to defeat unionisation, are unfair labour practices. If the employer actually puts into effect such reprisals or benefits another unfair labour practice has been committed.

In Avildsen Tools and Machines, Inc.⁴³ the Board held that the employer had violated s.8(a)(1) of the Act

43. 112 NLRB 1021 (1955).

by promising and granting wage increases and benefits in order to influence employees to vote against the Union.

In Exchange Parts Co.⁴⁴ after the Board had issued its election order, employees received a letter from the company which spoke of the empty promises of the Union and the fact that it is the company that put things in their envelope.⁴⁵ Accompanying the letter was a detailed statement of the benefits granted by the company since 1949. Included in the statement of benefits granted by the company for 1960 were "birthday holiday", a new system for computing overtime during holiday weeks which had the effect of increasing wages for those weeks, and a new vacation schedule which enabled employees to extend their vacations by sandwiching them between two weeks. The latter was the first general announcement of the changes to the employees. In the ensuing election the Union lost. The Supreme Court per Justice Harlan held : " The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. The danger may be diminished, if, as in this case, the benefits are conferred permanently and unconditionally. But the absence of conditions or

44. 375 US 405 (1964).

45. "Envelope" means here, of course, pay-envelope.

threats pertaining to the particular benefits conferred would be of controlling significance only if it could be presumed that no question of additional benefits or renegotiation of existing benefits would arise in future; and, of course, no such presumption is tenable We cannot agree with the Court of Appeals that enforcement of the Board's order will have the 'ironic' result of 'discouraging benefits for labor'. The beneficence of an employer is likely to be ephemeral if prompted by a threat of unionization which is subsequently removed. Insulating the right of collective organisation from calculated good will of this sort deprives employees of little that has lasting value."

Thus in this case a comprehensive ruling on economic inducement was given. It is to be welcomed that the Supreme Court saw the problem with such clarity.

Moving of a plant or a department to avoid unionization is an unfair labour practice, just as is the threat thereof. This anti-union tactic is known as the runaway shop.⁴⁶ If the purpose was found to be to avoid unionization the Board will declare the removal unlawful. The Board does not order the employer to move the runaway plant back to the old location, but the Board sometimes orders an employer to re-establish a department which has been

46. See The Runaway Plant - an Impediment to Peaceful Union-Management Relations, 34 Temple Law Quarterly, Winter 1961, 136-145. As regards the closing of a plant see post, p.158.

replaced by "a contracting out system".⁴⁷ The Board has ordered back pay together with reinstatement at either the old or the new location. But when the employer's decision to move is based solely on economic considerations, there is no violation.⁴⁸

In most cases the employer knows very well who are the real union men in his enterprise and therefore might approach them individually and promise them wage increases or other benefits if they will get on the right side of the fence. This is, of course, also a violation of s.8(a)(1) of the Act.⁴⁹

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47. Where part of a plant's work is farmed out to another company this is called contracting out. Such diversion of work for the purpose of avoiding unionization is an unfair labour practice. See Drennon Feed Products Co., 122 NLRB No.163 (1959).
48. For a case where the Board found removal justifiable see Brown Truck & Trailer Mfg. Co., 106 NLRB 999 (1953).
49. See Reliance Manufacturing Co., 28 NLRB 1051 (1941). See also Sterling Cabinet Corp., 109 NLRB 6 (1954) where an employee was told that he would get a wage increase if he got rid of a representation petition.

II: Protection against Discrimination

General Observations

S.8(a)(3) of the NLRA provides that it shall be an unfair labour practice for an employer : - by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labour organisation.¹ Thus discriminatory treatment of an employee for the purpose of encouraging or discouraging union membership is outlawed.² It is also unlawful to refuse to hire an employee because he is a union member or engaged in union activities. The purpose of these provisions is not merely to protect unions in their right to organise but also to protect individual employees against a certain union. In practice organisation was and is often obtained via an employer. Pressure is exercised by a union on an employer in order that the latter should discriminate against an employee on account of his membership or nonmembership in a union.³

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1. A proviso to s.8(a)(3) permits an employer and a union to agree to a limited form of union shop. See post, p.148 note 10. The Railway Labor Act does not expressly outlaw discrimination, but such conduct is covered and proscribed by the broad language of s.2, Fourth.
 2. By s.8(a)(4) of the NLRA it is an unfair labour practice for an employer to discriminate against an employee because he has filed charges or given testimony under the Act.
 3. By s.8(b)(2) of the Act also a union may be guilty of an unfair labour practice. See post, p.148.

Protection Against Discrimination for Union Activity

S.8(a)(3) proscribes discriminatory discharges, layoffs and demotions. It is also unlawful discriminatorily to withhold employee benefits such as bonuses, insurance and pension benefits, and wage increases.

The question of discharge because of union activity was dealt with at great length in Budd Manufacturing Company v. NLRB.⁴ In this case the court per Biggs J. held : "The amended complaint alleges that in July, 1941, the petitioner discharged an employee, Walter Weigand, because of his activities on behalf of the union The case of Walter Weigand is extraordinary. If ever a workman deserved summary discharge it was he. He was under the influence of liquor while on duty. He came to work when he chose and he left the plant and his shift as he pleased. Weigand stated that he was carried on the payroll as a 'rigger'. He was asked what was a rigger. He replied 'I do not know; I am not a rigger'. He brought a woman (apparently generally known as the Duchess) to the rear of the plant yard and introduced some of the employees to her. He took another employee to visit her and when this man got too drunk to be able to go home, punched his time-card for him and put him on

4. 138 F2d 86 (CA3, 1943). The full facts of the case are given here because it is a good example to show that although the discharge of an inefficient and/or insubordinate union member or organiser is lawful, it becomes discriminatory if other circumstances reasonably indicate that the union activity weighed more heavily in the decision to dismiss him than did the dissatisfaction with his performance.

the table in the representatives' meeting room in the plant in order to sleep off his intoxication. Weigand's immediate superiors demanded again and again that he be discharged but each time higher officials intervened on Weigand's behalf because as was naively stated he was 'a representative'.⁵ In return for not working at the job for which he was hired, the petitioner gave him full pay and on five separate occasions raised his wages. One of these raises was general; that is to say, Weigand profited by a general wage increase throughout the plant, but the other four raises were given Weigand at times when other employees in the plant did not receive wage increases. The petitioner contends that Weigand was discharged because of culminative grievances against him. But about the time of the discharge it was suspected by some of the representatives that Weigand had joined the complaining CIO union. One of the representatives taxed him with this fact and Weigand offered to bet a hundred dollars that it could not be proved. On July 22, 1941 Weigand did disclose his union membership to the vice-chairman (Rattigan) of the Association and to another representative (Mullen) and apparently tried to persuade them to support the union The following day Weigand was discharged. An employer may discharge an employee for a good reason, a poor reason or no reason at all so long as the provisions of the NLRA are not violated.

5. Representative means here representative of a union, i.e. representative of the Association.

It is, of course, a violation to discharge an employee because he has engaged in activities on behalf of a union. Conversely an employer may retain an employee for a good reason, a bad reason or no reason at all and the reason is not a concern of the Board. But it is certainly too great a strain on credulity to assert as does the petitioner, that Weigand was discharged for an accumulation of offences. We think that he was discharged because his work on behalf of the CIO had become known to the plant manager. That ended his sinecure at the Budd plant. The Board found that he was discharged because of his activities on behalf of the union. The record shows that the Board's finding was based on sufficient evidence. The order of the Board will be enforced."⁶

The problem in the above case was mainly a matter of proof on a question of fact, namely whether the employer's real reason for the discharge was the employee's union activity or something else. For the most part cases involving discriminatory action to discourage union membership or activities have presented questions of fact.

The question of the employer's motive is of vital importance in cases where discriminatory action to discourage or encourage union membership or activities is alleged.

6. Of course this is an extreme case. However, see NLRB v. Dixie Shirt Co., 176 F2d 969 (CA4, 1949), NLRB v. Fulton Bag & Cotton Mills, 175 F2d 675 (CA5, 1949).

A leading case where the law as regards motive was laid down is Radio Officers Union v. NLRB.⁷ In this case the Court per Mr. Justice Reed held : "The language of s.8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus the section does not outlaw all encouragement or discouragement of membership in labor organisations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such, only such discrimination as encourages or discourages membership in a labor organization is proscribed That Congress intended the employer's purpose in discriminating to be controlling is clear."⁸ The Senate Report on the Wagner Act said : 'Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform.' An employer can discriminate without being guilty of an unfair labor practice so long as he does not thereby intend to encourage or discourage union membership or activity. But it is recognised that proof of certain types of discrimination is sufficient proof of intent to encourage or discourage union activity; this is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct"

7. 347 US 17 (1954).

8. "Subjective evidence" that the employee was actually encouraged or discouraged in his attitude toward the union is not required.

Discrimination to Encourage Union Membership

There are many cases where the employer, under pressure from a union, has discharged employees or otherwise discriminated against them for some reason connected with their union or non-union membership. In the Radio Officers' case the Supreme Court held the following to constitute unlawful encouragement of union membership by discrimination: (1) reducing a truck driver's seniority standing because he did not keep up his union dues; (2) causing a ship's radio officer to be refused employment because he did not obtain union clearance; (3) granting a retroactive wage increase to union members and refusing such benefits to other employees because they were not union members. Of course there are many other examples.

In NLRB v. Richards⁹ the court of appeals per McLaughlin J. held : "Reduced to simplest concepts the case is one of an employer discharging employees in order to replace them with men favored by the union. The situation in reverse where union employees are discharged in favour of men belonging to another or no union is a well recognised unfair labor practice. NLRB v. Waterman S.S. Corp., 309 US 206 (1940). The only difference between the two situations is that in the latter the result is to discourage union activity on the part of the remaining and new employees, while in the former that activity is encouraged. Both results are prohibited to the employer by s.8(a)(3)."

9. 265 F2d 855 (CA3, 1959).

The Taft-Hartley amendments by s.8(b)(2) made it a union unfair labour practice to cause or attempt to cause an employer to discriminate against an employee on account of his membership or nonmembership in a union subject to an exception for valid union shop agreements.¹⁰

A union may expel a member for any reasons it considers sufficient, whether good or bad, but it may not take away the member's livelihood, or cause discrimination in the terms and conditions of his employment. The only exception to that is that when a valid union-shop agreement exists employees must meet their initiation fees and dues.¹¹

10. The union-security proviso to s.8(a)(3) of the NLRA permits agreements between unions and employers requiring as a condition of employment membership in the contracting union after the expiration of a specified 30 days' grace period. However, a union can validly enter into such an agreement only if it is the bona fide representative of the employees covered in an appropriate bargaining unit. By s.9(e) of the Act employees in a unit covered by a valid union shop agreement may request a deauthorization election. At least 30 per cent of the employees in the unit covered by the union-shop agreement must join in the deauthorization petition. If a majority of the employees eligible to vote, vote for deauthorization, the union shop clause is suspended. It should be noted that a majority of the employees eligible to vote must cast a ballot that they wish to have the clause suspended. If they do not trouble to vote just a majority of those who actually have cast a ballot is not enough. But the Act provides that no deauthorization election shall be conducted in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

11. S.8(b)(5) makes it an unfair labour practice for a union to charge employees covered by a valid union security agreement an initiation fee "in an amount which the Board finds excessive or discriminatory under all the circumstances". In Television and Radio Broadcasting Studio Employees, Local 804, 315 F2d 398 (CA8, 1963) the court of appeals upheld the Board's finding that a union's increase of its initiation fee from 50 dollars to 500 dollars was excessive, discriminatory, and therefore violative of the Act.

When an employee fails to meet this requirement the union may lawfully demand his discharge.

In General Motors Corporation, Packard Electric Division¹² the Board overturned its earlier ruling and held that an employee may lawfully be discharged for dues delinquency even though he makes a belated tender of his back dues after the union requested his discharge and before the actual discharge.

The agency shop¹³ constitutes a permissible form of union security under the NLRA.¹⁴ Also a maintenance-of-membership provision¹⁵ in a collective agreement is permissible. It is subject to the same regulations as the union shop under the NLRA.

It was held in New York Times Co.¹⁶ that s.8(b)(2) is violated when the union engages in threats, slowdowns, and strikes to force an employer to give preference in hiring to union members over nonmembers.

12. 134 NLRB 1107 (1961).

13. The agency shop is an arrangement provided for in a collective agreement, whereby non-union employees are required to contribute to the financial support of the union, usually in a sum equal to the union dues.

14. See NLRB v. General Motors Corporation, 373 US 734 (1963).

15. Under a maintenance-of-membership provision an employee need not join the union but if he does, or having been a member fails to resign during the "escape period", he then voluntarily binds himself to remain a member of the union for the duration of the agreement as a condition of continued employment.

16. 101 NLRB 153 (1952).

In the leading case of Local 357, International Brotherhood of Teamsters v. NLRB¹⁷ the main question before the Supreme Court was whether a hiring-hall agreement,¹⁸ despite the inclusion of a nondiscrimination clause, is illegal per se. In this case there was no evidence of actual discrimination to encourage union membership. The Court said that Congress has not outlawed the hiring hall, though it has outlawed the closed shop except within the limits prescribed by the provisos to s.8(a)(3). The Court went on to say that it is the "true purpose" or "real motive" in hiring or firing that constitutes the test, and that discrimination cannot be inferred from the face of the instrument when the instrument specifically provides that there will be no discrimination against employees because of the presence or absence of union membership. In the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed

17. 365 US 667 (1961).

18. Hiring-hall agreements as used in American Labour Law means that an employer enters into an agreement with a union pursuant to which the union operates in effect, as an employment agency, to furnish the employer with applicants for jobs. The employer gives notices of vacancies and accepts men sent to him by the hiring hall. The hiring hall has been a common practice in industries in which employment is casual or intermittent, such as longshoring, construction and building. A union hiring hall is not violative of the law as long as persons are not discriminated against to encourage or discourage union membership.

affirmatively to disclaim all illegal objectives.¹⁹

The 1959 amendments to the NLRA established some special union-security rules for the building and construction industry. The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of industry. It is not an unfair labour practice for an employer engaged primarily in the building and construction industry to make an agreement, covering employees engaged in that industry, with a union of which building and construction employees are members because : (1) the majority status of such union has not been established under the provisions of s.9 of the NLRA prior to the making of such agreement, or (2) such agreement requires as a condition of employment membership in such union after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such union of opportunities of employment with such employer, or gives such union an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment

19. This decision overruled Mountain Pacific Chapter of the Associated General Contractors, 119 NLRB 883 (1958). The rule laid down in that case was that the hiring-hall agreement, despite the inclusion of a nondiscrimination clause, is illegal, per se. A hiring-hall arrangement to be lawful must contain certain protective provisions.

based upon length of service with such employer, in the industry or in the particular geographical area.²⁰

S.14(b) of the NLRA provides that nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a union as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.²¹ At present 19 states have availed themselves of this section and have enacted what are misleadingly known as "right-to-work laws".²²

A 1951 amendment to the Railway Labor Act²³ specifically permits union-shop agreements. It should be noted that this amendment supersedes all state laws.

20. For further details see s.8(f) of the NLRA. See also Goldberg and Meiklejohn Taft-Hartley Amendments, with Emphasis on the Legislative History, Nw. U.L.Rev. Jan. 1960, pp.774-777.

21. In May, 1965, President Johnson asked Congress to repeal s.14(b) of the NLRA. See The Times, (London) May 19, 1965, p.10. The issue is certain to divide Congress sharply.

22. Some states merely render any such contractual provision unenforceable while others speak of such as illegal or as a combination in restraint of trade or as an illegal conspiracy. Some state laws specifically outlaw agreements conditioning employment on payment of dues or fees to a union.

23. 64 Stat. 1238 (1951), 45 USC §152, amending 44 Stat. 577 (1926). In Railway Employees' Dept. v. Hanson, 351 US 225, (1956), the question before the US Supreme Court was whether a union shop agreement entered into by a railroad and a union was violative of the "right-to-work" provision of the Nebraska Constitution. The Court held that the 1951 amendment, permitting union shop agreements, expressly allows those agreements notwithstanding any law of any state.

Discrimination is not limited to hiring and discharge. Many of the cases under s.8(b)(2) involve agreements or understandings with employers which have the purpose of securing preferential treatment of the contracting union's members. For example it has been held that to cause an employer to lay off an employee who resigned his union membership is violative of s.8(b)(2).²⁴ So is to cause an employer to discriminate against a non-union employee in re-employment after a layoff.²⁵ A union was held to have violated s.8(b)(2) when it required an employer to deny promotion to a non-union employee and grant it to a union member.²⁶

Both the union and the employer may be guilty of an unfair labour practice, the union for causing or attempting to cause the discrimination and the employer for acquiescing. The aggrieved employees may bring their charges against either the union or the employer or both. But the Board can proceed only against the charged party or parties. Most of the cases dealing with discrimination to encourage union membership involve union security matters.

24. See Packinghouse Workers, Local 267, 114 NLRB 1279 (1955).

25. See Local 170, Teamsters, 110 NLRB 850 (1954).

26. See Brodsky and Son, 144 NLRB 819 (1955).

Reinstatement and Back Pay

When the NLRB finds that the employer has discharged an employee in violation of s.8(a)(3), it will normally order reinstatement with back pay. However, where the employee has engaged in misconduct the Board may, in the exercise of its discretion, withhold this remedy on the ground that it would not effectuate the purpose of the Act.²⁷

S.10(c) of the NLRA empowers the Board to issue orders requiring such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act. In Phelps Dodge Corp. v. NLRB²⁸ the Supreme Court interpreted the phrase giving the Board power to order "reinstatement of employees with or without back pay" not to limit, but merely to illustrate the general grant of power to award affirmative relief. They held in that case that the Board could order back pay without ordering reinstatement. Reinstatement is not a condition precedent to a back pay award.²⁹

27. For example an unfair labour practice strike which is not conducted peaceably.

28. 313 US 177 (1941). Approved in the Radio Officers' case, 347 US 17 (1954).

29. NLRB v. International Association of Heat and Frost Insulators and Asbestos Worker, 261 F2d 347 (CA1, 1958).

As regards back pay it is stated in the 22nd Annual Report of the NLRB (1958) : "The amount to be paid is computed on the basis of what the employee would have normally earned but for the discrimination. From this amount are deducted the employee's net earnings during the period involved, i.e. actual earnings from other employment, or earnings which the discriminatee would have had if he had made a 'reasonable search' for other employment."³⁰

The discriminatee is under a duty to minimise loss.³¹ An employee claiming back pay must have made reasonable effort to secure other employment, but the employer has the burden of proving lack of such effort by the claimant.³² The question arises whether the duty to mitigate requires a discriminatee to accept less than substantially equivalent employment. In the Southern Silk Mills case³³ the court of appeals held that, under the circumstances, work at a somewhat lower rate of pay constituted "desirable new employment", and that the discriminatees' failure to seek or take such employment constituted to some extent at least loss of earnings wilfully incurred.

30. See p.75 of the Report. For the details of back pay proceedings, see Silverberg, How to Take A Case Before the NLRB, pp.266 ff. (1959).

31. In Great Britain there is a somewhat similar rule, namely, the common law rule concerning minimisation of loss in cases of wrongful dismissal.

32. See American Bottling Company, 116 NLRB 1303 (1956)

33. 242 F2d 697 (CA6, 1957) cert. den., 355 US 821 (1957).

In 1962 the Board decided to discontinue its practice of abstracting the portion of back pay awards from the date of a Trial Examiner's report to the date of a Board order in those cases in which the Examiner found no violation but the Board later reversed his recommendation and held that a discriminatory discharge had occurred. It was held in APW Products Co.³⁴ that the blameless employees are not made whole for their monetary loss for the full period of the discrimination and are to that extent punished for exercising their statutory rights under s.7, solely because of the erroneous conclusion reached by the Examiner.

Also in 1962 the Board commenced the practice of requiring the payment of six percent interest on back pay due to discriminatorily discharged employees. In NLRB v. Isis Plumbing & Heating Co.³⁵ the court of appeals set aside the Board's order without deciding whether the Board had the power to require payment of interest upon back pay awards.

S.10(c) provides, among other things, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organisation, as the case may be, responsible for the discrimination suffered by him. The purpose of Congress in enacting this provision was not to limit the power of the Board to order

34. 137 NLRB 25 (1962). Members Rodgers and Leedom dissented.

35. 322 F2d 913 (CA9, 1963).

back pay without ordering reinstatement but to give the Board power to remedy union unfair labour practices by employers.³⁶

In Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. NLRB³⁷ the Supreme Court considered whether the Board is empowered, as a matter of course, to order reimbursement of dues and fees in cases where s.8(b)(2) has been violated. The Court held that the Board had acted beyond its power when it ordered the union to return all fees collected from members as it had not been shown that a single employee was coerced to join the union ranks or to remain a member.

Where both the employer and the union are guilty of unfair practices and are joined in the complaint, the order will be directed against them jointly.³⁸ Where only one party, either the union or the employer, is named in the complaint, it will be solely liable for the full amount.³⁹

The question arises what happens when an employer who has committed an unfair labour practice sells or

36. See the Radio Officers' case (1954), supra

37. 365 US 651 (1961).

38. See Union Starch & Refining Co. v. NLRB 186 F2d 1008 (CA7, 1951). Each party may be held liable for the full amount. But, of course, double recovery will not be allowed.

39. It was held in the Radio Officers' case, supra, that in order to charge a union with a violation of s.8(b)(2), it is not necessary to bring an action against the employer under s.8(a)(3). For s.8(b)(2) see ante, p.148.

reorganises his business? It was held in Colonial Fashions, Inc.⁴⁰ that if an employer closes his plant and goes out of business, he will not be required to reinstate employees even though they were discharged discriminatorily.⁴¹ However, he can be ordered to provide back pay from the date of the discrimination to the date the plant was closed.

In Darlington Mfg. Co.⁴² the employer was charged with violation of s.8(a)(3) of the Act by closing its business in order to avoid bargaining with the union or to retaliate against employees for their selection of a bargaining representative. The Supreme Court held :
" To go out of business in toto or to discontinue it in part permanently at any time, we think was Darlington's absolute prerogative but the right to discontinuance means an actual unfeigned and permanent end of operations - not a removal nor subcontract, nor a change merely in the form of the corporate entity."

The lockout is a traditional employer anti-union weapon. It is a term somewhat loosely used to refer to a variety of situations ranging from outright discharges to temporary layoffs. When used for the purpose of

40. 110 NLRB 1197 (1957).

41. The Board presumably meant here if he opens a new business he is under no duty to reinstate, or rather engage the discriminatees.

42. 84 SupCt 1170 (1963). See also NLRB v. New England Web, Inc., 309 F2d 696 (CA1, 1962).

defeating attempts at union organisation or to avoid bargaining it is clearly an unfair labour practice.⁴³

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43. Great Falls Employer's Council, 123 NLRB No. 109 1959. Order was denied enforcement by the court of appeals, see 277 F2d 772 (CA9, 1960). Cf. Brown Food Store, 319 F2d 7 (CA10, 1963), and Dalton Brick & Tile Corp., 301 F2d 886 (CA5, 1962). In these cases the same principle was enunciated but on the facts it was found that no unfair labour practice had been committed.

III: Company-Dominated Unions

General Observations

The maintenance of a "company union" dominated by the employer, may be a ready and effective means of obstructing self-organisation of employees. In the thirties employers tried over and over again to form the so-called company unions. Formally the right to organise was upheld, but by dominating or interfering with the formation of a union, or assisting a union financially, they retained complete control over the union.¹ Plant wide bargaining gave a good chance and opening to these practices.² Practices of this kind were outlawed by s.8(a)(2) of the NLRA.

S.8(a)(2) provides that : "It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organisation or contribute financial or other support to it: Provided, that subject to rules and regulations made and published by the Board pursuant to s.6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

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1. In the National Industrial Recovery Act 48 Stat.198 (1933); FCA Uncodified Material, p.503, there were no prohibitions regarding company unions.
 2. An organisation of employees limited to the employees of a single employer is not banned provided the employer does not dominate, support financially, or has interfered with the formation of the union.

Cases in which unions have been found to be dominated have been few in number in recent years, as compared with the thriving of such company unions in the thirties. This is a good sign because it shows that the law is effective.

Domination of Unions

It was held in Pacemaker Corp.³ that domination is found only where the employer has interfered with the formation of the organisation and has assisted and supported its administration to such an extent that it must be regarded as his own creation and subject to his control.

One of the leading cases on the subject is NLRB v. Pennsylvania Greyhound Lines, Inc. (1938).⁴ In this case before the enactment of the NLRA, the employer, whose employees were unorganised, initiated a project for their organisation under company domination. In the course of its execution officers or other representatives of the company were active in promoting the plan in urging employees to join, in the preparation of the details of organisation, including the by-laws in presiding over organisation meetings, and in selecting employee representatives of the organisation.

3. 260 F2d 880 (CA7, 1958).

4. 303 US 261 (1938). Full details of the case are given here because in this case almost everything which was and still is forbidden was done by the employer. It is thus a very good illustration in spite of the fact that it is not a recent case.

The by-laws and regulations provided that all motorbus operators, maintenance men and clerical employees, after three months service automatically became members of the Association, and that only employees were eligible to act as employee representatives. No provisions were made for meetings of members, nor was a procedure established whereby employees might instruct their representatives, or whereby those representatives might disseminate information or reports. Grievances were to be taken up with regional committees with final review by a Joint Reviewing Committee made up of an equal number of regional chairmen and of management representatives, but review in those cases could not be secured unless there was a joint submission of the controversy by employee and management representatives. Change of the by-laws without employer consent was precluded by a provision that amendment should be only on a two-thirds vote of the Joint Reviewing Committee, composed of equal numbers of employer and employee representatives. Employees paid no dues, all the Association expenses being borne by the management. Although the Association was in terms created as a bargaining agency for the purpose of providing adequate representation for the company's employees by securing for them satisfactory adjustment of all controversial matters, it functioned only to settle individual grievances. The Board came to the conclusion that the company had engaged in unfair labour practices by active participation in the organisation and administration of the Employees Association, which they

dominated throughout its history, and to whose financial support they had contributed. It ordered that the company cease each of the specified unfair labour practices. It further ordered that they withdraw recognition from the Employees Association as employee representative authorized to deal with the company concerning grievances, terms of employment, and labour disputes, and that they post conspicuous notices in all the places of business where such employees are engaged, stating that the "Association is so disestablished and that the company will refrain from any such recognition thereof." The Supreme Court reversed the decision of the circuit court of appeals and upheld the Board's order. The Supreme Court per Mr. Justice Stone held : " We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union before an election by employees under s.9(c),⁵ even though it had ordered the employer to cease unfair labor practices. But here respondents, by unfair labor practices,

5. This section has been repealed by the Labor-Management Relations Act, 1947 and has been replaced by a new section. The old section provided that "whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under s.10 or otherwise, and may take a secret ballot of employees or utilize any other suitable method to ascertain such representatives." For the present law see ante, pp.62 f.

have succeeded in establishing a company union so organised that it is incapable of functioning as a bargaining representative of employees. With no procedure for meetings of members or for instructing employee representatives, and with no power to bring grievances before the Joint Reviewing Committee without employer consent, the Association could not without amendments of its by-laws be used as a means of collective bargaining contemplated by s.7; and amendment could not be had without the employer's approval "

Unlawful support to a union may be financial or non-financial, or both. Where it is financial the illegality is measured in terms of its effect upon the recipient union and the employees and not in terms of its cost to the employer. The following cases give an illustration of what is meant by financial support : In Conner Foundry Co.⁶ a gift of 400 dollars and the right to operate a canteen which made a profit of 50-100 dollars monthly was considered evidence of domination. In NLRB v. Jack Smith Beverages⁷ the Board considered it as evidence of domination when the employer paid membership dues for every employee who joined the union. In Corson Mfg. Co.⁸ the support was non-financial. In this case the absence of any constitution,

6. 199 NLRB 146 (1952).

7. 202 F2d 100 (1953).

8. 112 NLRB 323 (1955).

by-laws, or membership requirement, other than employment in the plant, in the employee representation plan was considered domination.

Employer interference with the formation and administration of a union or the contribution of financial or other support which violates s.8(a)(2) but falls short of actual domination is held to be illegal assistance.

Remedies

In cases involving employer's unfair labour practices that are so extensive as to constitute a domination of the union the Board will order disestablishment of the union, regardless of whether or not it is affiliated with a national or international federation.⁹ Moreover where the parties have concluded a collective bargaining agreement the Board will order that the agreement be given no effect.

There are those cases in which unfair labour practices are limited to support and interference that never reach

9. Identical standards must be applied to affiliated and unaffiliated local unions. In Coppus Engineering Corporation v. NLRB, 202 F2d 564 (CA1, 1957) the court of appeals held that in deciding cases involving unfair labour practices under s.8(a)(1) or s.8(a)(2) the Board should apply the same regulations and rules of decision irrespective of whether or not the union affected is affiliated with a national or international union. The court relied in its decision on s.10(c) which was re-enacted by the Taft-Hartley amendments. However, cases where an affiliated union has been found to be dominated by the employer are extremely rare.

the point of domination.¹⁰ In such cases the Board orders that no recognition be given to the union until it has been certified by it,¹¹ again without regard whether or not the union happens to be affiliated.

10. See NLRB v. Wemyss, 212 F2d 465 (CA9, 1954) and NuTone Inc., 112 NLRB 1153 (1955) where the lesser offence of assistance and support was found.

11. For "certification by the Board" see ante, pp.62 f.

Chapter 8

Protection of Freedom to Organise in the Federal Republic of Germany

General Observations:

Art.9(3), limb 2, provides that agreements which restrict or seek to hinder the right to organise are null and void and measures directed to this end are illegal. This part of the article was mainly enacted to protect freedom to organise against social and economic forces, for example, the protection of an employee against his employer or an existing trade union.

Measures are specifically mentioned in the article to distinguish them from agreements. Measure in this context does not only mean a unilateral act,¹ like the giving of notice, but also any act or forbearance which restricts or seeks to hinder the right to organise.² The instances where infringement of this part of the article may occur are manifold.

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1. A unilateral act is an act in the law (Rechtsgeschäft) constituted by the declaration of intention of one person only. The declaration may either be one which is not effective unless communicated to another party, e.g. a notice, or it may be effective without communication, e.g. a will.
 2. See Hueck-Nipperdey, II, p.97. For the same view see Bogs, ArbRBlattei, Vereinigungsfreiheit, B III 3.

Discrimination to Discourage Union Membership

Discriminatory action by an employer to discourage union membership or activity is a clear violation of Art.9(3).³ Also s.51 of the Works Council Statute prohibits discriminatory treatment by an employer of an employee because of union activity or his views regarding unionism. Some examples of discriminatory action by an employer to discourage union membership are : (1) Transferring an employee to a job with less pay or to a more difficult job (2) Refusing to hire a person because of his union membership (3) In general, any disciplinary action inflicted upon an employee because of his union membership.

Promises of Benefits and Threats of Economic Reprisals

Threats of economic reprisals or promises of benefits to induce employees to relinquish their union membership are illegal under Art.9(3). For example where an employer threatens an employee that he will stop paying him a wage over and above the collective wage⁴

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3. An employer's right to organise is also guaranteed by Art.9(3), any measure which restricts or seeks to hinder them in the exercise of this right is violative of the article. For example if the union threatens with a strike or actually calls a strike for the purpose of inducing an employer to leave an employers' association or to prevent him from joining a certain employers' association it has violated Art.9(3).
 4. That part of the wage which is in excess of the collective wage rate can be reduced or terminated by the employer without resort to collective negotiation with the union.

or exclude him from benefits of the voluntary welfare service⁵ if he does not relinquish his union membership Art.9(3) has been violated. Also promises of benefits are illegal under Art.9(3) for instance where an employer promises an employee to transfer him to a better job if he will relinquish his union membership. It goes without saying where an employer actually puts into effect such promises or threats Art.9(3) has been violated.

Discharge Because of Union Membership or Activity

A discharge because of union membership or activity is violative of Art.9(3) even in cases where the employer gave proper notice.⁶ By s.134 of the Civil Code⁷ and Art.9(3) such discharge is void. The employment relationship continues. The employer is in "mora accipiendi" (Annahmeverzug) if he does not accept the performance offered to him by the discharged employee.

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5. Voluntary welfare services are quite common in the Federal Republic. Usually the services are given either unilaterally (i.e. by the employer) or by an agreement between the employer and the Works Council. Where they are given unilaterally the employer is entitled to exclude an employee from benefits. Of course where the exclusion takes place because of union membership he has violated Art.9(3).
 6. The Federal Labour Court has held that discharges which merely indirectly restrict freedom to organise are also void. See decision BAG AP Nr.33 concerning s.1 of the Law for the Protection of Notice.
 7. S.134 provides, among other things, that any act expressly prohibited by law is void on the ground of illegality unless the enactment containing the prohibition provides otherwise.

By s.615 of the Civil Code the employer is obliged to continue to pay wages.⁸

Where the labour court finds that the discharge is void in accordance with Art.9(3) it does not have to consider whether the discharge is also socially unwarranted (sozial ungerechtfertigt); the latter is a requirement under the Law for the Protection of the Right to Notice (1951).⁹ It is important to note that the period of limitation of action laid down in that statute¹⁰ does not find application to cases where an employee alleges that he was discharged because of union membership or activity.¹¹

8. The employer is not entitled to claim any subsequent performance of such unperformed services but has the right to deduct from the wages the value of any outlay saved by the employee in consequence of his non-performance or of any income which he has actually earned or might, but for his intentional neglect, have earned, by some other employment of his services. See s.615 of the Civil Code.

9. Kündigungsschutzgesetz (cited as KSchG) of August 10, 1951. The statute provides that a discharge may take place only where a valid reason exists for such discharge. By s.1(2) a discharge is socially unwarranted which is not based on reasons connected with the person or conduct of the employee, or on "pressing operational requirements" of the undertaking. See post, p.181 footnote 2.

10. Under s.3 of the Law for the Protection of the Right to Notice an action for a socially unwarranted discharge must be brought within three weeks from the day the plaintiff received notice.

11. See Nikisch, Arbeitsrecht, Vol.I, 2nd ed, p. 267.

Discrimination to Encourage Union Membership

It is now generally accepted that the right of the individual to refrain from organising is guaranteed by the Basic Law. Opinions are, however, divided whether this right accrues from Art.9(3) or from Art.2(1) of the Basic Law.¹² A number of eminent scholars and courts hold the view that there was no need for the legislator to state it expressly in Art.9(3), and that it is self-evident that the right of the individual to refrain from organising is part and parcel of freedom to organise; the former is therefore also guaranteed and protected by that article.¹³ Others are of the opinion that this right is not protected by Art.9(3) but that Art.2(1), which guarantees to everyone the right to develop his personality freely (das Recht auf freie Entfaltung der Persönlichkeit), includes freedom of decision as to whether a person wishes to join an organisation or not.¹⁴

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12. Art.2(1) of the Basic Law provides that everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.
13. See Huber II, pp.383 f; v. Mangoldt-Klein, comment V, 11, concerning Art.9; Gernandt, Zu den Eingriffen in die negative Koalitionsfreiheit, Arbeitgeber 1954, pp.154 ff and pp.194 f; Böttcher Waffengleichheit und Gleichbehandlung im kollektiven Arbeitsrecht (1956) p.15; Nikisch II, pp. 28 f; for an interesting treatise on the subject see Födisch, Freiheit und Zwang im geltenden Koalitionsrecht, RdA 1955, pp 88 ff. For court decisions see LAG Muenchen, Amtsblatt Bayer ArbMin. 1950, p.349 and LAG Hamm, Betrieb 1954, p.1048.
14. See Wernicke, Bonner Kommentar, comment II 1d and 3e concerning Art.9; Rewolle, Der Schutz der negativen Koalitionsfreiheit Betrieb 1950, p. 594 - this writer, however, is of the opinion that the right accrues from Art.9(3) by virtue of Art.2(1).

Nipperdey is of the opinion that the right of the individual to refrain from organising is not protected by Art.9(3) and that the organisation, to a certain extent, has the right to exercise compulsion.¹⁵ Individual activities of the organisation are protected by Art.2(1) of the Basic Law which guarantees to everyone, and this includes organisations, the right "to do and refrain from doing as desired (Handlungsfreiheit)". But this is only a qualified right and is only protected so long as the rights of others are not violated or the constitutional order or the moral code is not transgressed. Thus organisations by compelling membership must be careful not to violate the rights of others. For example where an employer, under pressure of a union, refuses to engage an employee because he is unorganised this is violative of Art.12(1) of the Basic Law which guarantees to every German the right to a free choice of a place of work.¹⁶ The unorganised employee, who did not obtain the job because he is unorganised, certainly has a cause of action under s.823(1) of the Civil Code against the union. Under the same section he will also succeed in an action against the prospective employer unless the latter can prove that if he had not given way to union pressure his

15. See Hueck-Nipperdey II, pp.114 ff.

16. Article 12(1) of the Basic Law provides that all Germans have the right freely to choose their trade or profession, their place of work and their place of training ...

enterprise would have suffered serious damage.¹⁷

According to Nipperdey to compel an organised employee to join another organisation is an infringement on the right to organise and therefore violative of Art.9(3).

There are only a few writers who hold the view that the right of the individual to refrain from organising is not guaranteed by the Basic Law.¹⁸ Their main legal argument is that Art.9(3) speaks about "the right to form associations" and not "freedom to associate".

In the Laender Hesse and Bremen compulsory unionism is prohibited by their respective constitutions.¹⁹ By virtue of Art.142 of the Basic Law these provisions remain in force.²⁰

If the right to refrain from organising is guaranteed by Art.9(3) measures which restrict or seek to hinder employees from exercising this right are illegal.²¹ Thus any discriminatory action by an employer to encourage union membership is illegal. Also threats of economic

17. For further discussion of s.823(1) see ante, pp.99 f, 111 f.

18. See Eberhard, RdA 1949, p.126; Herbert Bachmann Von der Zwangskoalition zum Koalitionszwang, Munich 1951; Bogs, AR-Blattei: Vereinigungsfreiheit, B I 3.

19. See Art.36(2) of the constitution of Hesse and Art.48 of the constitution of Bremen.

20. For Art.142 see ante, p.78 footnote 2.

21. As for an action for compensation and/or a prohibitory action in cases where Art.9(3) has been violated, see post, pp.182 ff.

reprisals or promising or granting of benefits are illegal. However, according to Nikisch, where organised employees put pressure on the employer, for example by threatening with strike action, in order that he should discharge unorganised employees and the employer to avoid damage to his enterprise discharges the unorganised employees the employer has not violated Art.9(3).²² He maintains that possibly the duty to look after the welfare of the employees (Fuersorgepflicht) has been violated by the employer.²³ Moreover, as a rule, such discharges are socially unwarranted under the Law for the Protection of the Right to Notice. Only in cases where it can be proved by the employer that his enterprise would have suffered very serious damage, e.g. closing down of the business, the discharges might be considered socially warranted.²⁴ The employees who induced the employer to discharge the unorganised employee have violated Art.9(3).

If the right to refrain from organising is guaranteed by Art.9(3) agreements which restrict or seek to hinder employees in the exercise of this right

22. See Nikisch II, pp.39 f.

23. The "Fuersorgepflicht" obliges an employer, among other things, to protect his employees to a certain extent from unlawful interference with their personal liberty. A violation of this duty gives rise to a claim for compensation where the employer has acted wilfully or negligently. See Nikisch, Arbeitsrecht, 2nd ed, Vol.I, s.50 II 2.

24. See Hueck-Nipperdey II, p.124. For the Law for the Protection of the Right to Notice, see post, p.181 footnote 2.

are null and void.²⁵

A study of the various views reveals that, though the writers base their views on different legal grounds, the Basic Law guarantees the right of the individual to refrain from organising.²⁶

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25. The Absolute Organisational Clause, a clause in a collective agreement which obliges employers who are members of the contracting employers' organisation to employ organised employees only, is null and void. Nipperdey considers such clauses null and void because they are violative of Art.12(1) of the Basic Law. See ante, p.172 note 16. So is the Relative Organisational Clause, a clause in a collective agreement which forbids employers who are members of the contracting employers' organisation to employ employees who are not members of the contracting union. This type of clause is an infringement on Art.9(3) even if the right to refrain from organising was not guaranteed by that article as it hinders the employee in his choice which union to join. See Nikisch II, p.37. Union Shop and Maintenance of Membership clauses are unknown in the Federal Republic of Germany. Null and void is also the Absolute Exclusion Clause, a clause in a collective agreement which provides that unorganised employees are not to enjoy the same working conditions as employees who are members of the contracting union. But this does not, of course, mean that the unorganised employees are entitled to the collective terms agreed upon in the agreement. Such clause is merely null and void. It should be noted that Nipperdey, who is of the opinion that the right to refrain from organising was not guaranteed by Art.9(3), does not consider such clauses null and void. See Hueck-Nipperdey, Grundriss des Arbeitsrecht, 2nd ed., pp.168 f. An Agency Shop Clause, a clause in a collective agreement which obligates employees who do not join the contracting union to pay the equivalent of union dues and fees, is null and void. Moreover the collective parties lack competence to agree on special conditions for outsiders.
26. Even Nipperdey's view in practice leads almost to the same result. He allows so many exceptions to the right to compel membership that the right scarcely exists.

Interrogation of Employees

The question of interrogation of employees by their employer about their union membership¹ presents special difficulty. Nowadays it is generally accepted that interrogation of an employee by his employer about his union membership is not violative of Art.9(3).² Even where an employee undertakes by contract to disclose his union membership Art.9(3) has not been violated.

In the Federal Republic interrogation of employees about their union membership is allowed because the Collective Bargaining Statute has provisions which make this necessary. This statute provides that employees who are not members of the contracting organisations cannot derive rights and are not bound by the provisions of the collective agreement (tarifgebunden).³

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1. During the Weimar Republic many scholars were of the opinion that the employee's duty to disclose his union membership was incompatible with Art.159 of the Weimar Constitution.
 2. Interrogation in itself is not a "measure" within the meaning of Art.9(3). But when the employer upon hearing about the union membership discriminates against the employee because of his union membership or refuses to hire a person because of his union membership the article has been violated. See Nikisch, II, p.36.
 3. The collective agreement binds the contracting parties and only employers and employees who are members of the contracting organisations. The normative part of the agreement is binding on employers and employees, who become members of the contracting organisations after the collective agreement came into force, from the day they became members of the organisation. See s.3 of the Collective Bargaining Statute. The same applies to the obligatory provisions but this is for different legal reasons.

Thus it is understandable that an employer who is bound by a collective agreement wishes to find out whether his employee is also bound by the agreement and is entitled to the collective terms of employment. An employer who is bound by a collective agreement has to pay collective wages if he tries to avoid paying those wages by hiring non-organised or differently organised employees he acts contrary to the provisions of the agreement (tarifwidrig).⁴

There are instances where it is unfair that the employer should not know about his employees' union membership. For example where an employee keeps silence about his membership in the contracting union and accepts a lower wage than the collective wage, he has not forfeited his right to the collective wage. The employee is entitled from then on to the collective wage, and to the difference between the collective wage and the lower wage he has been receiving from the day the agreement came into force. Furthermore where an employee joins the contracting union after having been employed in an undertaking and does not disclose his union membership and is satisfied with a wage which is below the collective wage, he is entitled from then on to the collective wage and from the day he joined the union to the difference between the collective wage and the lower wage he has been receiving.

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4. Every collective agreement has an implied condition that the contracting organisations will do all in their power to induce their members to implement the terms of the agreement. Thus if an employer, who is bound by an agreement, hires unorganised employees the provisions of the agreement are not implemented.

In both cases, mentioned above, the employer has to pay back-pay even if he learned about the union membership after the lapse of a considerable time and it is immaterial whether the employee is still in his employment or not. The plea of "Arglist" (exceptio doli generalis)⁵ is open to the employer but this will only be accepted by the court in cases where the employee has grossly abused the rights guaranteed to him by statute. Only where there are special circumstances which should have made the employee reveal his union membership is the employer apt to succeed. Whether there was actually an undue exercise of a right (unzulaessige Rechtsausuebung) is decided on the merits of each case.

The question arises, where there is a collective agreement and an employee who is a member of the contracting union denies his membership when questioned about it by his employer, whether the contracting union fails in the duty to see to it that the terms of the agreement are implemented?

It is clear that where an employee does not reveal his union membership when questioned about it by his

5. According to the provision of the civil law the "exceptio doli generalis" does not require a plea (Einrede), in the sense of the civil law, and as a condition that the defendant's conduct was point-blank "dolus" (arglistig). It is now settled by case law and legal doctrine that the principle of "good faith" (Treu und Glauben) applies to all obligations. Where it appears from the facts which were brought before the court that the above principle should find application, there is no need to rely specially on s.242 of the Civil Code, the court has to consider it on its own motion. The proof of "undue exercise of a right" (unzulaessige Rechtsausuebung) rests on the defendant.

employer because the latter has threatened him with discriminatory treatment or discharge in case he should join the union, this does not involve a failure to implement the terms of the agreement for which the contracting union of which the employee is a member is responsible. It has been held by the Land Labour Court of Hanover that it is a typical behaviour for an employee who is a union member to deny his union membership when questioned about it by his employer and that this does not affect the duty of the union to see to it that the terms of the agreement are implemented.⁶

It follows from the above that it is only equitable that an employer who is bound by a collective agreement should be allowed to question his employees about their union membership. In general an employer who is bound by a collective agreement will not openly be anti-union and therefore the disclosure of union membership will not entail detrimental treatment. But what about employers who are not bound by a collective agreement? Here there is a danger that knowledge about union membership might be abused. It is sometimes difficult to prove that a certain act or omission amounts to a measure within the meaning of Art.9(3). Would not it be enough to allow interrogation only in cases where the employer is bound by a collective agreement?

6. See LAG Hanover, AP 52, Nr.8. Many eminent scholars are of the opinion that in this case the Court went too far. See also the decision of the Land Labour Court of Mannheim, LAG Mannheim AP 52 Nr.112.

Remedies

Motive of Employer

In practice it is often very difficult to prove that a measure which was employed by an employer is violative of Art.9(3). The illegality of the measure can only be inferred from the motive or objective of the employer. For instance the discharge cases constitute a special difficulty. There may be another reason or reasons why an employer wishes to discharge an employee which have nothing to do with union membership. A well-founded suspicion that the discharge took place because of union or non-union membership is not enough. Where it cannot be proved that the employer's motive or objective was to discourage or encourage union membership the discharge is not illegal in accordance with Art.9(3).¹

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1. The same applies to other discriminatory action by an employer.

But in such cases the discharge might be socially unwarranted under s.1 of the Law for the Protection of the Right to Notice.²

2. The Law for the Protection of the Right to Notice provides that a discharge may take place only where a valid reason exists for such discharge. The statute applies to employees who are above the age of twenty and who have been employed in an undertaking for six months without interruption. The statute applies only to undertakings which employ more than five employees. By s.1(2) of the statute a discharge is socially unwarranted which is not based on reasons connected with the person or conduct of the employee, or on "pressing operational requirements" of the undertaking. Reasons connected with the "person" include physical or mental unsuitability for the job, unreliability and frequent sickness. Some examples of reasons connected with the conduct of employees are: (1) Repeated unpunctuality (2) a well-founded suspicion that the employee commits a criminal act (3) disturbing the peace of the undertaking (4) leading a scandalous life. Some examples of "pressing operational requirements" are: (1) lack of orders or decline in sales (2) rationalisation of the business (3) lack of raw materials (4) difficulty in obtaining credit (5) failure of machines, electricity or gas provided they are not just short interruptions. Even if there are "pressing operational requirements" the discharge is socially unwarranted if the employer, in his choice between several employees, has not paid sufficient regard to the social aspect. Exceptions are allowed if the undertaking is in need of special services which only certain employees can render.

The employee has to take the initiative by filing his action at the local labour court. The burden of proof is on the employer that the discharge is socially warranted. Where the court finds that the discharge was in fact socially unwarranted the employment relationship has not been dissolved and the discharge has no legal effect. Upon the request of either party, the court may award compensation in lieu of ordering continuation of the employment relationship.

Compensation

A measure which is violative of Art.9(3) may give rise to a claim for compensation. But the illegality in itself is not enough as the German law of tort does not incorporate the principle that any wrongful act (widerrechtlich) whereby damage is caused to someone entitles to compensation.¹

By s.823(2) of the Civil Code a person injured by a wrongful and negligent (fahrlaessig) or wilful (vorsatzlich) act² by means of which an express provision of law intended for the protection of others is violated is entitled to claim compensation from the wrongdoer. Clearly Art.9(3) is a law for the protection of individual employers and employees; hence a wilful or negligent act whereby a provision of that article has been violated entitles the injured person to claim compensation from the wrongdoer.

It is doubtful, however, whether compensation can also be claimed under s.823(1).³ Nowadays most eminent scholars are of the opinion that this subsection also

1. Cf. Enneccerus-Lehmann, Schuldrecht (Law of Obligations) 15th ed., 1958, s.229 II.

2. For "negligent or wilful act" see ante, p.111.

3. For s.823(1) see ante, pp.99, 111.

gives rise to a claim for compensation.⁴

There are cases where the measure in "contra bonos mores". In these cases there is a cause of action under s.826 of the Civil Code.⁵

Where a public official employs a measure, in exercise of a public office entrusted to him, which is violative of Art.9(3) a right to compensation arises pursuant to s.839 of the Civil Code and Art.34 of the Basic Law.⁶

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4. Whether an employee can claim under this subsection as well is of no practical importance as he has a cause of action under s.823(2). As regards s.823(1) this section gives rise to a claim for compensation for the following reasons. The basic right of "free development of personality", Art.2(1) Basic Law, includes freedom to organise. It is provided in that article that "everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code". Thus the right is not merely guaranteed against governmental infringement but also against private persons within the limitations imposed by the proviso. From that it follows that the "allgemeine Persoenlichkeitsrecht" (i.e. respect, inviolability and freedom of activity of the individual) is a private right as well. As it is an absolute right it is a "sonstiges Recht" (other right) which s.823(1) protects. See Nikisch, II, pp. 41 f., Hueck-Nipperdey II, p.99. It is nowadays undisputed that the "allgemeines Persoenlichkeitsrecht" is guaranteed by the Basic Law. For an excellent treatise on the subject see "Allgemeines Recht der Persoenlichkeit", Enneccerus-Nipperdey, 5th ed., s.101.
5. For s.826 see ante, p.109 foot 2.
6. Liability rests in principle on the public authority or the state etc. which employs him. In the case of wilful intent or gross carelessness the right of recourse is reversed. See s.839 of the Civil Code and Art.34 of the Basic Law.

The amount of compensation to be paid is determined on the merits of each case. As a rule in cases of discharge because of union membership or activity, or non-membership, the amount of compensation awarded is not very high.⁷ In other cases of discrimination because of union membership, non-membership or activity, the amount of compensation to be awarded is determined in accordance with ss.249 ff. of the Civil Code. German law embodies the principles of restitution in kind (Naturalrestitution). Subject to certain exceptions a person liable to make compensation is bound to restore the state of things which would have existed if the event creating the liability had not happened.⁸ For instance where an employee because of union membership was transferred to a more difficult job or to a job with less pay his original job has to be given back to him.

Moreover in many cases an employee can institute a preventive prohibitory action (vorbeugende Unterlassungsklage).⁹ For example where by a measure, employed by an employer, a statutory provision for the

7. As has been mentioned before the discharge is void. Also all other unilateral acts by an employer to discourage or encourage union membership are void.

8. See s.249 of the Civil Code.

9. This additional remedy has been developed by the courts; it is not expressly mentioned in the Civil Code. For "prohibitory action (Unterlassungsklage)" see Palandt introduction to s.823 comments 8(a), (b) and (c); Enneccerus-Lehmann, Schuldrecht II, s.252 I, p.976. See also ante, p.115.

protection of others has been violated and there is a danger that the unlawful act will be repeated or continued this type of action lies.¹⁰ It is important to note that such action lies even if the employer has not acted wilfully or negligently.

10. Art.9(3) is a statutory provision for the protection of others, see ante, p.182.

Company Unions

The social partners¹ must be financially and otherwise independent of one another.² Financial or non-financial support³ of a union, by an employers' association, group of employers, or employer, deprives it of one of the characteristics of an organisation as required by Art.9(3) of the Basic Law.⁴ In other words such a union is not an organisation within the meaning of Art.9(3) and therefore the rights and protection guaranteed by that article do not apply to it and its members.

The law is very strict as regards support; even indirect support, financial or non-financial, has the effect that the union is not an organisation within the

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1. For "social partners" see ante, p.86 footnote 22.
 2. This was also the prevailing view during the Weimar Republic. See Sinzheimer, Grundzuege des Arbeitsrecht (1927) second ed., p.27; Flatow - Kahn-Freund, Kommentar zum BetrRG (Betriebsraetegesetz), 1931, s.8, comment 5. Nowadays all eminent scholars hold the same view. See Hueck-Nipperdey II, p.66; Dietz, BetrVG, s.2, comment 8. This harmonises with Art.2 of ILO convention No.98 (1949) which was ratified by the Federal Republic in 1955. See ILO Code 1951, Vol.I, pp.69 ff. and post, p.208 footnote 25.
 3. For example a check-off arrangement is considered support.
 4. For "characteristics of an organisation" see ante, pp.82 ff.

meaning of Art.9(3).⁵

Company unions, the so-called Werkvereine, which were usually formed and supported by employers in opposition to the established unions, and which as a rule excluded the strike as a weapon, had been contemptuously referred to as "yellow unions". It is clear, as yellow unions are supported by employers they are not organisations within the meaning of Art.9(3). They were specifically excluded from the famous union-employers' agreement of November 15, 1918, (Zentralarbeitsgemeinschaft) in which German employers unconditionally recognised the unions as the spokesmen of German labour and which served as a pattern for much of the subsequent legislation during the Weimar Republic. After this agreement yellow unions disappeared and they did not seriously reappear after 1945.

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5. Of course also an employers' association which is financially or otherwise dependent on a union is not an organisation within the meaning of Art.9(3). The question arises what about co-determination? Co-determination is a practice that puts union members in the Aufsichtsrat (supervisory board) and a union member in the inner circle of top management namely in the Vorstand. The question arises whether an employers' association of which some or all of its members are employers in whose firm there is co-determination, is an organisation within the meaning of Art.9(3). Dietz is of the opinion that such employers' associations are nevertheless organisations within the meaning of the article. See Dietz, Die Grundrechte, III/I, pp.431 f., Hueck-Nipperdey II, pp.79 f. The whole argument is hairsplitting; it is difficult to conceive that these enterprises are under the domination of unions.

In the Federal Republic unions which are financially or otherwise dependent on the social partner do not enjoy the protection of Art.9(3) and they have not got the capacity to enter into collective agreements.⁶ But there is no law which provides that they must be disestablished or that these practices are unlawful. However, in practice a union which has not got collective bargaining capacity cannot be very powerful.

6. See Hueck-Nipperdey, Grundriss des Arbeitsrechts, second ed., pp.201 f.

Chapter 9

Protection of Freedom to Organise in Great Britain

General Observations

In Great Britain freedom to organise is not protected by law but this does not mean that discriminatory treatment by employers because of union membership or activity does not happen. Many of the short strikes concern alleged victimisation of shop stewards or other employee representatives. As the law does not protect, labour has to avail itself of such remedies.

Fair Wages Resolution

In 1946 a Fair Wages Resolution was adopted by the House of Commons.¹ A Fair Wages resolution in itself has no statutory force, it is only the expression of the will of Parliament about the way in which the executive should safeguard the interests of employees employed by employers to whom government contracts are given. Clause 4 of the Resolution provides that "the contractor shall recognise the freedom of his workpeople to be members of Trade Unions."² Clause 3 of the Resolution provides that "in the event of any question arising as to whether the requirements of this Resolution are being

1. Fair Wages Resolution of the House of Commons of 14 October 1946, No.4, 427 Hansard 619 f. See Cmd 7225 p.289.

2. In general local authorities and the corporations of nationalised industries insert in contracts a clause based on the Fair Wages Resolution.

observed, the question shall, if not otherwise disposed of, be referred by the Minister of Labour to an independent Tribunal for decision". In practice such questions are referred by the Minister of Labour to the Industrial Court.³ When called upon the Court decides whether, and to what extent, the contractor has been in breach of the Resolution. It is then the responsibility of the contracting department to secure that any breach which the Industrial Court may have found is remedied. Possibly the Department will be entitled to an injunction. It is obvious as individual employees are not parties to the contract they have no cause of action.⁴ At any rate failure to observe the provisions of the Resolution will result in the loss of government contracts by the employer concerned.

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3. The Industrial Court was established under the Industrial Courts Act, 1919 (9 & 10 Geo.V, c.69). The word court is here a misnomer; it is in effect a standing arbitration body. The Court is a permanent and independent tribunal whose awards are not legally enforceable. The members of the Court are appointed by the Minister of Labour and are: independent persons, and persons representing employees and employers. It sits in divisions, usually composed of an independent chairman and two other members one of whom is a representative of employers and the other a representative of employees. The Act provides where the members are unable to agree as to the terms of their award the matter shall be decided by the chairman. The procedure of the Court is governed by the Industrial Court (Procedure) Rules, 1920 (S.R. & O. No. 554 (L.6)). For further details regarding the Industrial Court see Ministry of Labour, Industrial Relations Handbook (H.M.S.O.1961) pp.137 ff.
4. It might be argued that where the contract is governed by Scots law the "jus quaesitum tertio" rule might find application, but this seems rather doubtful. To the knowledge of the present writer no attempt has been made to invoke the rule in this connection.

In 1964 the Association of Supervisory Staffs, Executives and Technicians (hereinafter referred to as the Association) complained that M. Wiseman and Company Limited (hereinafter referred to as the Company) to which a public contract was awarded had failed to observe clauses 4 and 5 of the Fair Wages Resolution (1946).⁵ The matter was referred by the Minister of Labour to the Industrial Court for decision.⁶ The main issue in this case was the re-employment of four union officials.⁷

In support of their claim that the Company was failing to recognise the right of their foremen to be members of the Association, the Association relied mainly on the following points : (1) that when in 1955-56 a first attempt was made to organise the foremen they were told they would be dismissed if they joined a union. Moreover, there had been advice proffered to them on promotion to the position of foreman that they should leave their union and become non-unionists. (2) On the 17th December, 1963, it was arranged that a meeting should take place between the Works Manager and five delegates

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5. Clause 5 provides that "the contractor shall at all times during the continuance of a contract display, for the information of his workpeople, in every factory, workshop or place occupied or used by him for the execution of the contract a copy of this Resolution".
 6. See (3039) Fair Wages Resolution.
 7. This case serves as a good example of how breaches of the Fair Wages Resolution are dealt with by the Industrial Court. The main submissions made by the parties are given here as the Court does not state in its awards the facts of the case.

of the foremen, to determine the entitlement of the latter in respect of sick pay and superannuation. The meeting came to nothing because they were told that the person who could decide those matters could see them only two days later. The foremen's delegates were also told that a discussion of their grievances with one of the Directors could not take place until the end of January, 1964. Believing that the Company was deliberately procrastinating, the foremen left the factory on the afternoon of the 17th December to discuss the matter, and were dismissed on returning to work the next morning. During the period from 18th December until the 8th May, 1964, the Association tried every constitutional means to persuade the Company to re-engage the staff they had dismissed. At local level the other unions at the factory attempted to mediate, Conciliation Officers of the Ministry of Labour tried to persuade the Company to discuss with the Association arrangements for the re-employment of the staff concerned, and the local Member of Parliament also intervened, but all without success. Finally, however, the General Secretary of the Scottish Trade Union Congress persuaded the Company to agree to arrangements whereby all but four of the dismissed staff would re-start work by 8th May, 1964, the four to be guaranteed re-employment within four weeks of that date. The Company had not kept faith in the matter; they refused to re-engage the remaining four foremen and, one of the four having subsequently died, were still refusing to re-engage the remaining three.

The Company submitted that the 30 works supervisors had absented themselves from their afternoon duties on 17th December. That action was calculated and intended to cause complete dislocation of work at the factory for the afternoon. It was an act of the utmost irresponsibility on the part of the supervisory staff who had been given no provocation whatsoever. Their dismissal was entirely justified.

As to the Association's contention that they had tried every constitutional means to persuade the Company to re-engage the dismissed persons the Company maintained that between 18th December 1963 and the 8th May 1964, Association members had continually picketed the factory, had threatened some of the ordinary employees when outside the factory and had incited them to sabotage machinery;⁸ they had sent copies of a threatening letter to other employees⁹ had obtained publicity through the media of press and television in an attempt to discredit the Company; and had behaved offensively in other ways. As a result of the behaviour of the former supervisors, who had expressed an intention to force the factory to close, feeling in the factory ran high, and on more than one occasion employees had to be restrained from fighting with the Association's pickets. At a meeting on 25th February, 1964,

8. Statements alleging specific incidents of misconduct signed by three apprentices on the 16th July, 1964, were submitted. It is interesting to note that the statements were by "apprentices".

9. A copy of the letter was placed before the Court.

the factory shop stewards had confirmed that the re-instatement of the dismissed persons would cause a number of the present employees to leave and might well lead to industrial action by other employees at the factory.

Immediately after the supervisors had absented themselves on the 17th December, 1963 the Company had started to re-organise the system of working at the factory so as to ensure the continuation of its work. The Company was successful in achieving those objects. In view of this and of the matters referred to above, they were reluctant to re-employ any of the dismissed supervisors. However, 26 supervisors had been re-employed by 8th May, 1964. The Company denied that they had undertaken to re-employ the remaining four supervisors.¹⁰

As regards the first point relied on by the Association the factory manager in evidence said that he had said something similar but it did not amount to what the Association was alleging. Moreover, in 1956 Government work had not yet started at their factory.

In this case the Court decided that up to the 28th January, 1964, the Company were in breach of clause 5 in that they did not display at their factory a copy of the resolution as required by the aforementioned clause but that it had not been established that the Company had at any material time failed to observe the requirements of clause 4.

10. A letter was placed before the Court in which it was stated, among other things, that the Company was prepared to do its utmost to find work for the remaining 8 people within 4 weeks. Four of the eight were actually re-employed but the rest were not.

It is the practice of the Industrial Court to express its awards without discussion of the merits of the submissions made by the parties or of the factors on which the awards are based. Occasionally brief references are made to exceptional features which have been taken into account by the court. This seems a great drawback, as just by reading the award it is impossible to tell why and how the court arrived at a certain decision. Also there is no possibility of relying on previous decisions where similar facts were before the court.

Obviously clause 4 of the Fair Wages Resolution was adopted by the House of Commons to protect employees in their right to organise. But the Court has never given an interpretation as to what sort of protection the clause affords. For example from a complaint made by the National Association of Toolmakers against the Pressed Steel Company Limited¹¹ it appears that the Court decided that the requirements that the contractor shall recognise the freedom of his workpeople to be members of Trade Unions means that employees are free to join the union recognised by the employer, and not other unions if the joining of other unions might lead to industrial unrest. But this can only be learned indirectly from the award and it is not quite certain whether this was the main ground why the Court arrived at its decision.

11. See (3009) Fair Wages Resolution.

Thus a union cannot know what activity by an employer would be considered an interference with the right to organise. Moreover, in cases of discharge because of union membership or activity the court is not empowered to order re-instatement, and neither has the contracting Department a legal remedy whereby the employer can be forced to do so.

The Industrial Court awards do not get enough publicity. Only decisions which relate to a substantial part of industry are reported in the Ministry of Labour Gazette. For example the two above mentioned awards were not published in the Gazette because they do not relate to a substantial part of industry.

Last but not least the clause applies only to employers to whom government contracts are given.

Courts of Inquiry

By the Industrial Courts Act, 1919,¹² the Minister of Labour is empowered to refer any matter appearing to him to be connected with or relevant to a trade dispute, whether existing or apprehended, to a Court of Inquiry. In practice such courts are appointed only when no settlement of a dispute seems possible, and it is reserved for matters of major importance affecting the public interest. Thus usually only disputes which take place in big undertakings come before a Court of Inquiry. The Courts of Inquiry are a means of informing Parliament and the public of the facts underlying causes of a dispute.

12. For Industrial Court see ante, p.190 footnote 3.

The recommendations of the Court are not binding in law. The consent of the parties to the dispute to refer the matter to a Court of Inquiry is not required.

A number of Courts of Inquiries were appointed to inquire into disputes which arose over alleged victimisation of union members.

For example in 1963 a Court of Inquiry was appointed to inquire into the causes and the circumstances of a dispute between the Ford Motor Company, Ltd., Dagenham and members of the trade unions represented on the trade union side of the Ford National Joint Negotiating Committee.¹³

The facts were briefly as follows : Arising from a redundancy situation the Company refused to re-engage 17 shop stewards. Out of the 17 men two had 17 years of service with the Company, one had 13 years, one had 11 years, two had 10 years and two had 9 years. It was clear that the 17 men who were not to be re-engaged in any circumstances were taken out of turn, and that the opportunity was being taken by the Company to dispense with the services of men who were regarded as trouble-makers. A very detailed statement of the offences for which these men were held responsible was submitted to the Court, but it did not appear that it was put before the Union concerned. These misdemeanours had occurred over a number of years but the Company had taken no steps when they actually occurred. The Company insisted

13. See Cmnd 1999 of 1963.

on their right to dismiss employees who in their judgement were unsatisfactory and disloyal and the unions adhered to the principle of "last in, first out" which they maintained was in accordance with normal industrial practice where there is redundancy.¹⁴

The Court was impressed by the similarities between the submission of the parties in the present case and those made in 1957, and remarked that the hopes which were raised on that occasion had not been fulfilled.¹⁵

The Court said that it was important to recognise the Company's right to engage and discharge labour as thought fit, subject always to the proviso that the exercise of this was seen to be fair and equitable.

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14. The Redundancy Payments Act (1965, c.62) does not make provisions as to the order in which employees are to be dismissed where there is redundancy. By s.8 of the Act in order to be entitled to a payment an employee must have at least 104 weeks of continuous service, over the age of eighteen, with his employer. The amount of a redundancy payment depends, among other things, on how long the employee has been employed with his employer. Thus the Act indirectly enforces the above mentioned rule as an employer will dismiss the men with shorter service in order to pay less or nothing at all. In general an employee dismissed for conduct justifying summary dismissal has no entitlement to a payment. See ss.2(2) and 10 of the Act.
15. In 1957 a Court of Inquiry was appointed to inquire into the causes and circumstances of a dispute at Briggs Motor Bodies Ltd., Dagenham, existing between the Ford Motor Company Ltd. and members of the trade unions represented on the Trade Union side of the Ford National Joint Negotiating Committee. See Cmd 131 of 1957.

The Court went on to say that there was no reason to suppose that any one of the 17 men was dismissed on the ground that he was a shop steward. Where there is a misdemeanour shop stewards have no claim to privilege. It is generally accepted, however, that the penalty for a misdemeanour should be imposed as soon as possible after the misdemeanour had occurred.¹⁶ This might take the form of suspension in the first instance with the prospect of dismissal to follow if a misdemeanour were repeated. As a rule it is not desirable that punitive action should be taken after a number of misdemeanours have been allowed to accumulate over a number of years.

The Court recommended that in resolving the present dispute the Company, without detracting from their fundamental right to discharge unsatisfactory employees, should supply the unions concerned with the details which they supplied to the Court concerning the records of the 17 men, and they should have regard to any proper observations which the unions might submit.

The Court remarked that the unions concerned had not enough authority over their shop stewards.

The Court made the following proposal : The unions which are members of the National Joint Negotiating Committee might appoint a full-time official for work at Fords with special responsibility for supervising the

16. The term "misdemeanour" is not used here in the legal sense.

shop stewards and for ensuring that procedure agreements are properly and fully observed. The salary of this official and any expenses connected with his work could be shared between the 21 unions in proportion to their respective memberships. It would be important that this official should have the full support of the National Joint Negotiating Committee. Just as arrangements are made by the Company for the training of foremen, the unions, either individually or collectively, but preferably the latter, should take steps to ensure that shop stewards received some training for the exercise of their responsibilities. Arrangements and facilities which existed to enable shop stewards to get in touch with their conveners was a problem of organisation which it should be possible to resolve with good will on both sides.

It appears from this case that the shop stewards were not re-engaged, not because of activities on behalf of their union, but for activities which most probably had something to do with unionism which, however, were not authorised by their union. The Court made a proposal that a full-time union official should be appointed with special responsibility for supervising the shop stewards. One wonders if a law in which the right to organise was guaranteed and protected would not be more effective. Of course a tribunal and appellate court would be required in order to interpret the scope of the law. The "motive" of the employer which is vital in such cases could then be considered by such a tribunal and court.

There is no need for the employer to be victimised. Moreover such court and tribunal must be empowered to give orders which can be legally enforced in cases where it has been found that the law has been violated. The present state of anarchy gives rise to injustice.¹⁷

In Great Britain the yellow dog document, a contract by which an employee agreed that he will not join any union or continue to be a member of a union during his tenure of employment, is not illegal. In 1952 a Court of Inquiry was appointed to inquire into a dispute between D.C. Thomson and Company Limited (hereinafter referred to as the Company) and certain workpeople, members of the National Society of Operative Printers and Assistants. The Company required their employees to sign an undertaking that they would not join a trade union. Throughout the dispute the unions asserted that their fundamental object was the abandonment of the undertaking to which they took exception. The Court of Inquiry thought that such an undertaking leads to a number of undesirable results but emphasized that the yellow dog document is perfectly legal.¹⁸

There was also a legal action. As the document is legal no proceedings could be instituted against the Company so the union sought the aid of other unions and

17. In this study it is stated how cases similar to the above are dealt with in the United States and in the Federal Republic of Germany. Despite the fact that the law in these countries is not entirely satisfactory it seems a better solution than having no law at all dealing with these problems.

18. See Cmd 8607 of 1952

a secondary boycott was started. Certain of the employees of Bowater Ltd, who supplied the Company with paper, expressed their unwillingness to handle paper destined for the Company. As a result Bowater Ltd told the Company that they would not be able to make deliveries of paper as they were required to do by contract. The Company sought an injunction against the union officials to restrain them from causing or procuring breaches of contract between Bowater Ltd and the Company. The Court of Appeal decided as the union officials had gone to the servant of Bowater Ltd and not to the company itself, namely to a director of Bowater Ltd, it was an indirect inducement only. As in this case no wrongful means were used it was not a tortious act.¹⁹

The D. C. Thomson case shows clearly how important it is, in countries where freedom to organise is not protected by law, that unions should be allowed to resort to economic weapons, although obviously this is not a satisfactory solution. Such contracts should be void. Thus the unions are fully justified in taking these drastic steps but there should not be a need for it. Moreover if employees in small firms are asked to sign such undertakings very often it does not come out into the open, and when it does the union might not consider it wise to declare a boycott because just a few employees are affected.

19. See D. C. Thomson & Co. Ltd. v. Deakin [1952] Ch.646. For "indirect inducement of a breach of contract" see ante, p.12.

Complaints to the International Labour Organisation

The U.K. has ratified I.L.O. Convention No. 87, concerning freedom of association and protection of the right to organise, and I.L.O. Convention No. 98, concerning the application of the principles of the right to organise and to bargain collectively. But of course these conventions do not become law simply because they have been ratified by H.M. Government. An Act of Parliament would be needed for that, and so far such an Act has not been passed.²⁰

A special procedure has been introduced by arrangement between the United Nations and the I.L.O. for the examination of alleged infringements of trade union rights. This procedure is not confined to alleged violations of obligations resulting from the ratification of conventions. In 1950 the Fact-Finding and Conciliation Commission on Freedom of Association was set up. Its chief duty is to make investigations into complaints submitted to it by the Governing Body of the I.L.O. where it is alleged that freedom of association has been violated. The only complaints which are considered by it, apart from those officially referred to the I.L.O. by the United Nations Assembly and the Economic and Social Council, are those made by workers' organisations, employers' organisations or by governments. A complaint may be submitted either to the United Nations or the I.L.O. The Economic and

20. Member States of the I.L.O. are under an obligation to ensure that national law and practice comply with the provisions of the conventions which they ratify.

Social Council passes on to the I.L.O. any complaints received by the United Nations regarding member states of the I.L.O., and the I.L.O. passes on to the Economic and Social Council any complaints affecting member countries of the United Nations which are not members of the I.L.O.

If the complaint is against a member state of the I.L.O. the complaint is communicated to the government concerned by the I.L.O. with a request to forward as soon as possible any observations or comments it may wish to make. The complaint, together with the government's observations, if any, are then submitted to the Governing Body for a preliminary examination.

Complaints regarding member states of the I.L.O. are examined by a special committee of the Governing Body, namely, the Committee on Freedom of Association. The main task of this Committee is to make a thorough preliminary examination of each complaint and of the observations made to it, if any, by the government concerned, and then to advise the Governing Body whether or not the matter calls for more exhaustive investigation. If the Committee on Freedom of Association is of the opinion that a complaint does not warrant further consideration it advises the Governing Body not to proceed with the case. If it considers that the complaint deserves further examination it may advise the Governing Body to refer the case to the Fact-Finding and Conciliation Commission on Freedom of Association. However, before the Governing Body can refer the case to that commission it must first

seek and obtain the consent of the government concerned. When the government concerned refuses to allow the case to be referred to the Commission the Governing Body is allowed to publish the complaint and the fact that the government concerned has refused to allow the complaint to be referred to the Commission.

In a number of cases where inquiry had shown that the right to organise was being violated the Committee on Freedom of Association advised the Governing Body, which accepted the Committee's recommendation, to ask the governments concerned to amend their law or practice. Some governments have acted on these recommendations.

It is obvious that a complaint to the I.L.O. may help to bring the matter out into the open but it is certainly not as effectual as could be desired.²¹

In 1954 the Aeronautical Engineers' Association (hereinafter referred to as A.E.A.) made a complaint to the I.L.O. that the Government of the U.K. had failed to secure the observance of conventions ratified by it. The A.E.A. complained that two government owned air corporations, namely B.O.A.C. and B.E.A.C. had violated Art.2 of Convention No. 87²² and committed acts prohibited

21. For further details see Freedom of Association and the Protection of the Right To Organise - A Workers' Educational Manual; published by the I.L.O. in 1959.

22. Art.2 of Convention No. 87 provides that "workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation".

by Art.1 of Convention No. 98.²³ It was claimed that an agreement made in the National Joint Council was contrary to these conventions. The agreement provided that as and when the recognised unions claimed 100 per cent membership in any shop or department of either Corporation, that shop or department would be debarred to members of the A.E.A. and the latter would not be allowed to work therein. It was alleged further, and more specifically, that B.O.A.C. by debarring members of the A.E.A. from working in certain shops and by denying them promotion was prejudicing employees because of their union membership, contrary to Art.1, para 2(b) of Convention No. 98, and by making it obligatory for them to relinquish their trade union membership as an essential preliminary to continued employment after transfer to a new base, was acting contrary to Art.1, para 2(a) of that convention. Moreover, it was contended that employees of B.E.A.C. who were members of

23. Art.1 of Convention No. 98 provides that: "1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. 2. Such protection shall apply more particularly in respect of acts calculated to - (a) make the employment of a worker subject to the condition that he shall join a union or shall relinquish trade union membership (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours." Art.3 of Convention No. 98 provides that machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in Articles 1 and 2 of this Convention.

A.E.A. were denied protection against acts of discrimination based on their union membership, contrary to Art.1 of Convention No.98 - e.g. denial of the right to work in certain departments, denial of opportunities for working overtime etc. The facts were not disputed.

The Committee on Freedom of Association came to the conclusion that the only evidence of any restriction of the workers' fundamental right to become a member of a trade union of their own choice pursuant to Art.2 of Convention No. 87 was to be found in the allegation that a worker wishing to join one of the unions recognised by the employers when he was already a member of A.E.A. must, under the rules of the recognised unions, first resign from the A.E.A. In other words, the A.E.A. itself made it clear that workers can exercise the right to join the A.E.A. or may choose to join one of the recognised unions subject to the rules of the union concerned. The Committee considered therefore that the complainant had not offered sufficient evidence to show that the fundamental right to exercise the freedom to join a trade union of their own choice guaranteed in Art.2 of Convention No. 87 had been violated.

The Committee also came to the conclusion that Art.1 of Convention No. 98 had not been violated. This article was so drafted as to exclude from its scope any question of the protection of one union against another. The Committee stressed that the article is aimed at prohibiting acts of discrimination committed in order to embarrass trade union activities as such.

The Committee recommended the Governing Body to decide that the case did not call for further examination.²⁴

In Great Britain there is no law dealing with company-dominated unions. If an employer wishes to establish such a union and recognise it he is free to do so. There is no law which provides that a union which is supported by an employer is incapable of representing employees for the purpose of negotiating terms and conditions of employment.

In 1962 the National Union of Bank Employees (hereinafter referred to as the N.U.B.E.) made a complaint to the I.L.O. that the Government of the U.K. had failed to ensure that the provisions of Convention No. 98, and, in particular, the provisions of Art.2, para 2, of that convention, which it had ratified, were being applied by certain British banks.²⁵ In their complaint the N.U.B.E. alleged that the banking employers were preventing them from exercising their proper and normal function as a trade union by supporting and using internal staff associations.

24. See the 13th Report of the Governing Body Committee on Freedom of Association. Published in the Official Bulletin of the I.L.O., Vol.XXXVII, No.4, dated 30th Nov., 1954.

25. Art.2 provides that "1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning and administration. 2. In particular, acts which are designed to promote the establishment of workers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article."

In addition to making certain observations of a general character, N.U.B.E. dealt specifically in its allegations with the situations in four Banks, namely the District, Martins, National Provincial and Yorkshire Banks.

The U.K. Government forwarded to the I.L.O. observations on the Complaint by the Management and Staff Associations of the four Banks particularly concerned. The Committee on Freedom of Association recommended to the Governing Body of the I.L.O. that the U.K. Government should be invited to arrange for an impartial, full and prompt inquiry into the facts of the case and to endeavour to promote an agreed settlement on the basis of such an inquiry. The Governing Body of the I.L.O. accepted the recommendations of the Committee. The Director General wrote to the Minister of Labour asking whether the U.K. government was in a position to undertake an inquiry on the lines suggested. In 1963 the Minister of Labour appointed the Honourable Lord Cameron, judge of the Court of Session of Scotland, to inquire into the complaint made by the N.U.B.E. to the I.L.O. and report.²⁶

The real issue in this case was recognition. The N.U.B.E. wished to represent exclusively the interests of all bank employees in these four (and all other) banks. None of the four Banks refused to receive and acknowledge written representations from the officers of the N.U.B.E. but they had not been prepared to accept oral representations

26. See Report of the Inquiry Cmnd 2202 of 1963, pp.112-115

from the same source or from the same person on the same subject.²⁷

Lord Cameron in the Report came to the conclusion that the Staff Associations were not company dominated unions. He was of the opinion that the N.U.B.E. had failed to appreciate the factual independence of the Staff Associations in their constitutions and functions, or the significance of the fact that these Associations command the support of large numbers of their professional colleagues, who are as independent-minded and responsible as the majority of their own members. He stated in the Report that it may well be that these representative organs have different philosophies from those of the N.U.B.E. as to their functions and the best methods of representing and furthering the legitimate interests of their members, but that it must be kept in view that the Staff Associations had achieved standards of pay and conditions which do not compare unfavourably with those achieved by the N.U.B.E. in the cases where it is the recognised negotiating body.²⁸

27. Trouble in banking started in 1919 with the arrival of the N.U.B.E's predecessor the Guild of Bank Officers. The staff associations, one to each bank, were started to prevent employees from joining the Guild. Membership in the staff associations was compulsory and officials were paid by the company. Until today only Lloyds have officers who are not paid by the bank but membership is no longer compulsory. See Colin McGlashan, Bank Clerks Breaking Down Old Antagonisms, Sunday Observer of 23 May, 1965

28. This is not really a proof that a union is not under the domination of an employer. It can be learned from cases in other countries that company-unions very often succeed in obtaining good working conditions for the employees of the company. But freedom of organisation involves more than just being paid well.

Lord Cameron suggested that the parties might endeavour with the assistance of officers of the Ministry of Labour, to explore the extent, manner and method in which N.U.B.E. representations on matters affecting the interests of their members could be usefully and helpfully conveyed to, and considered by and with, the Managements of the four Banks or their representatives in oral as well as written exchanges, but without prejudice to the full recognition presently enjoyed by their respective Staff Associations. He further suggested that the employers concerned on the one side and N.U.B.E. and the Staff Associations on the other should agree on a definition on what they would regard as "national issues" and agree on a method of joint consultation and discussion with the object of settling questions arising upon such issues. He added, that if this suggestion should commend itself it could be open for consideration and exploration throughout the industry.²⁹

29. Relations between the parties since the Inquiry have improved. See an article in The Times (London) of 16 June, 1964, entitled New Attitude to Banks Pay.

Comparisons and Conclusions
Relating to Part II

In the Federal Republic of Germany and the United States of America freedom to organise is protected by law. A study of the law in the two countries reveals that the law varies in certain respects but a common denominator can clearly be ascertained.

Freedom to organise is a prerequisite to collective bargaining. As the law of collective bargaining differs considerably in the two countries this sometimes has repercussions on certain aspects of the law dealing with the protection of freedom to organise. Specific rights which are of importance in one country are not always of the same importance in the other. Moreover there are differences because the machinery which deals with the enforcement of the law has to fit in with the rest of the judicial system of the country. Procedure and interpretation of the law must be in accordance with the rules of procedure and interpretation of the country in question. But in spite of all that the underlying principles are the same, namely to prepare the ground for collective bargaining, and an appreciation of the fact that this is a freedom which has to be protected like the rest of freedoms which every democratic country goes to great pains to protect.

In the Federal Republic freedom to organise is protected by a constitutional provision, whilst in the United States the right is not protected by the U.S. Constitution but by a federal statute.

In the United States the federal statute excludes certain persons from its protection, amongst them employees of federal, state and local governments and supervisors. It is to be regretted that after the enactment of the Taft-Hartley amendments supervisory employees are no longer protected against acts of discrimination. The term supervisor as defined in s.2(11) of the NLRA is by far too broad and includes employees who certainly cannot be considered as part of management.¹ S.2(3) of the NLRA provides in relevant part that the term "employee" shall not include any individual employed as a supervisor. That they have the right to join or remain a member of a union is not of much use if the right is not protected.² Also there seems no justification why employees of federal, state and local governments should not enjoy the protection afforded by the NLRA as regards the right to organise.³

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1. S.2(11) gives a functional definition of the term "supervisor". It provides that the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
 2. S.14(a) of the NLRA provides that nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.
 3. Postal employees enjoy a certain amount of protection. Under the Lloyd-La Follette Act (37 Stat.55, 5 USC §652, FCA 5 §652) they are protected from reduction in rank or removal due to union affiliation if such affiliation does not impose the obligation to engage in or support a strike against the United States.

This seems a hangover from the past for which nowadays there is no valid reason. As the Act excludes supervisory staff one can hardly say that those who would be covered by it occupy positions which call for a special loyalty towards their employer. It is expressly provided by the Labor-Management Relations Act, 1947, that individuals employed by the federal government are not allowed to strike.⁴ This could be extended to employees of state and local governments, though it is doubtful if there is a need for such a provision at all, as the Act even without it provides enough safeguards preventing unions from abusing their rights.

In the Federal Republic Art.9(3) of the Basic Law guarantees and protects freedom to organise to everyone and all professions. No one is excluded; the article applies even to soldiers in the army.⁵

In the Federal Republic freedom to organise is protected by a broad general provision in the Constitution.

4. See s.305 of the Labor-Management Relations Act, 1947 and ante, p.50.

5. From the beginning of August, 1966, soldiers are permitted not only to join an internal army association but to join any union of their own choice. Unions enjoy the same organisational rights as they have in private enterprises except that union meetings in barracks are prohibited. The above rights are clearly guaranteed by the Basic Law. But in fact up to August, 1966, the Defence Ministry forbade soldiers to join unions of their own choice. After a long battle the ÖTV (Union of Public Service, Transport & Traffic), which is affiliated to the top organisation, i.e. the DGB, succeeded in establishing those rights. See Schriften auf Stube in der Spiegel No. 34/1966 on p.21. In the United States soldiers are not within the jurisdiction of the NLRB.

In the United States, in the NLRA, there is a section with a general provision which outlaws all activities designed to obstruct or interfere with free organisational activities, and there are two sections which prohibit specific acts. Experience has shown that there is a need for a general provision as employers began to find ways to interfere with the right to organise without indulging in those practices specifically mentioned. Thus it appears that the right to organise can be protected more effectively by a general provision.

A general provision, however, gives to those who interpret the law a great deal of power. In the United States the Board, the Courts of Appeals and the Supreme Court interpret the scope of the law. But it is essentially the Board and to some extent the Supreme Court which interpret the law to keep pace with current developments. A great deal seems to depend on the political views of the members of the Board. For example the rule that subject to certain exceptions an employer does not commit an unfair labour practice if he makes a pre-election speech on company time and premises to his employees, and denies the union's request for an opportunity to reply⁶ was fashioned by members

6. In the United States, of course, propaganda campaigns before an election are of utmost importance because if the union succeeds in enlisting or getting the support of enough employees the Board certifies it, and the employer has to recognise it as bargaining agent.

of the Board who were appointed by a Republican President.⁷⁾⁸⁾

In the Federal Republic certain actions by employer which are blatantly discriminatory or interfere with the right to organise are generally accepted as a violation of Art.9(3), limb 2. In many instances they involve a violation of other basic rights guaranteed by the Basic Law. But specific activities are sometimes included or excluded in order that the law should harmonize with the rest of the law of labour relations. For example the interrogation of employees by their employer about their union membership is not a violation of Art.9(3), limb 2, of the Basic Law because it is considered that an employer who is bound by a collective agreement has a right to find out which of his employees are entitled to the collective terms of employment.

7. See Wirtz The New National Labor Relations Board; Herein of "Employer Persuasion", 49 Nw. U.L. Rev. (1954) pp. 598 f.

8. S.3(a) of the NLRA provides that the Board shall consist of five members, appointed by the President by and with the advice and consent of the Senate. They shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The president shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

In the Federal Republic it is the Federal Labour Court, sometimes Land labour courts, and eminent scholars who decide whether specific employer practices are covered by Art. 9(3), limb 2. Divisions of local labour courts and Land labour courts consist of a presiding judge, who must have qualifications for holding judicial office,⁹ and two lay members one of whom is a representative of employers and the other a representative of employees.¹⁰ A panel (Senat) of the Federal Labour Court consists of three federal judges (Bundesrichter) and two lay members, one an employer representative and the other an employee representative.¹¹ Thus in all labour courts there is an equal number of members from each side of industry. As has been mentioned before the Federal Labour Court through its decisions exercises a great influence on the decisions of the instances below it; in fact in a modified form the principle of stare decisis finds application.

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9. The presiding judge in a local labour court must have qualifications for holding judicial office or at least five years of practical experience in the field of labour law. The presiding judge in a Land labour court must have qualifications for holding judicial office.
 10. There are certain cases where divisions of labour courts must consist of a presiding judge and four lay members; two lay members from each side of industry. See ss.16(2) and 35(2) of the Labour Court Statute.
 11. The lay members of the Federal Labour Court must at least have been for four years members of a labour court before they qualify as members of the Federal Labour Court. Thus it is ensured that not only each side of industry is represented but that those representing them have experience in the field of labour law.

High authority is accorded by the courts to the opinions of eminent scholars despite the fact that no court is bound to adopt these views. They are instrumental in fashioning new doctrines, and each case which involves important or disputed questions of law, gives rise to the publication of numerous articles on the topic, often written even before the decision is given. Whether the exercise of such great influence on the interpretation of the scope of the law by a number of scholars, who are certainly of the highest academic order, is always desirable is questionable. The opinions of scholars from trade union circles are mostly ignored. It is the pure academic who is presumed to have a neutral approach and capable of seeing the picture as a whole.

In the United States any conduct on the part of the employer which is likely to influence the decisions of employees to organise is suspect; it may be privileged but unless a justification is available it is violative of s.8(a)(1) of the NLRA. In the Federal Republic the burden of proof lies on the plaintiff that a violation of Art.9(3), limb 2, has taken place.

In both countries in cases where victimisation because of union membership or activity or non-membership is alleged much attention is paid to the motive of the employer. In the Federal Republic, strictly speaking, it is enough to prove that actually a restriction in the right to organise has taken place. As regards agreements this can be inferred from the agreement itself but in most cases it is difficult to draw such inferences from an act

or omission. Thus where it is alleged that by a measure Art.9(3), limb 2, has been violated the motive or the purpose of the employer is controlling. In the United States when the Board looks at the evidence it must decide whether a preponderance of the testimony shows that the employer's real reason was to discourage or encourage union membership or whether the discriminatory treatment or discharge was for some other reason.

In the United States the federal law permits union-shop agreements under certain conditions whilst in the Federal Republic the prevailing view is that any type of union - security agreement is prohibited by the Basic Law. In both countries if by discriminatory action against an employee a union or an employer seeks to encourage union membership as such or in a particular union this is prohibited by law. In the United States a union-shop arrangement constitutes an exception to this rule. The right-to-work laws in the United States seem incompatible with the spirit of the NLRA. However, it appears that it will not be long now before s.14(b) of the NLRA is repealed.

It is maintained that in the Federal Republic there is no need for a union-security clause in a collective agreement as there is the possibility of extending the coverage of collective agreements to outsiders. To this can only be said this is by all means not the same. It is true that nowadays in the Federal Republic union rivalism has gone and there is no need to protect a union against another union. The problem, from the point of view of the union, are the outsiders, i.e. the non-organised

employees. Where a collective agreement is declared to be generally binding, and this is not possible in all instances certain conditions must be complied with, the outsiders reap the fruits of the efforts made by the union without paying union dues. The declaration that the agreement is generally binding mainly protects the unionised enterprise against non-unionised enterprises, as without the declaration the latter is free to pay lower wages and consequently in a position to offer goods and/or services at lower prices.

In the United States and in the Federal Republic, though technically the law varies, in practice an employee who has been discriminated against or discharged because of union activity or membership, or non-membership, or membership in a particular union, is restored to the position as if the unlawful event had not happened. In both countries the legislature refrained from imposing penalties. The aim of the law is not the punishment of the employer but rather the undoing of activities which interfere with the right to organise. In the United States efforts are made by the Field Examiner to dispose of charges informally and in the Federal Republic when an action is brought before the local labour court the presiding judge makes all efforts that the parties should reach an amicable settlement, and only after this is unsuccessful does the hearing of the case start.

In the Federal Republic company-dominated unions do not enjoy the protection of Art.9(3) and have no collective bargaining capacity. In this country industry

wide bargaining is the common pattern of bargaining. Industry wide bargaining is a major safeguard against the emergence of company unions. Thus the law does not make provisions for the disestablishment of such unions. The position is quite different in the United States where plant wide bargaining is prevalent. There it is an unfair labour practice for an employer to dominate or interfere with the formation or administration of a union or contribute financial or other support to it. In cases where the Board finds that a union is employer dominated it orders the disestablishment of the union, and if the parties have concluded a collective agreement it orders that the agreement be given no effect. Where a union is supported by an employer but not to the point of domination the Board orders that no recognition be given to the union until it has been certified.

Both in the United States and in the Federal Republic the law regards company unions as undesirable but the steps taken to make them ineffective vary. It is obvious that this is so because bargaining practices are not the same.

In Great Britain freedom to organise is not protected by law. The present situation is far from satisfactory. This is a sphere where it would be desirable that the law should intervene. Of course no law is perfect and infallible but if the law were to protect employees in this fundamental right a great deal of unnecessary discontent and industrial unrest could be avoided.

The American experience shows that a section in which

specific practices are listed very often does not solve the problem. In other words there might be a need for a general broad provision. An exception to this is the outlawing of company-dominated unions; this type of interference with the right to organise requires a more precise definition by the legislator. As has been pointed out before a general provision gives to the courts or tribunal which are faced with concrete cases a great deal of power - to a great extent they become the makers of policy. They are the ones which decide which specific anti-union-tactics by the employer come within the scope of the provisions of the law and which do not. Therefore there must be ample opportunity for review, both of facts and law, from the decision of the first instance.

The practice in the United States of a Field Examiner first investigating the complaint is to be recommended to Great Britain. In Great Britain, where in the sphere of industrial relations the parties prefer to settle disputes in an informal manner, this might lead to very satisfactory results.

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